(3)

No. 05-1401

AUG 4 - 2006
OFFICE OF THE CLERK

In The Supreme Court of the United States

ALBERTO R. GONZALES, ATTORNEY GENERAL,

Petitioner,

v.

VICTORIA TCHOUKHROVA, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether *INS v. Ventura*, 537 U.S. 12 (2002) (*per curiam*), and *Gonzales v. Thomas*, 126 S. Ct. 1613 (2006) (*per curiam*), required the Court of Appeals to remand to permit the Board of Immigration Appeals to rule on an issue the Board had already decided.

2. Whether *Ventura* and *Thomas* required the Court of Appeals to remand to permit the Government to assert a defense that it had never raised in the administrative process or at any time before the Court of Appeals issued its panel opinion.

3. Whether the Court of Appeals erred in concluding that the Board's "persecution" determination was not supported by substantial evidence.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

Respondents Victoria, Dmitri, and Evgueni Tchoukhrov respectfully oppose the Petition for a Writ of Certiorari filed by the Attorney General of the United States.

STATEMENT

The Court of Appeals below held that Victoria Tchoukhrova was eligible for asylum and entitled to withholding of deportation. The court concluded that Russia's horrific treatment of Victoria and her child, Evgueni, who has cerebral palsy, gave her a "well-founded fear of persecution." 8 U.S.C. § 1101(a)(42)(A). In so holding, the court agreed with nearly all of the determinations the Board of Immigration Appeals made in this case. In particular, the court agreed with the agency's conclusions "that the respondent and her family and child did suffer harm in Russia" and that the harm "was a result of the fact that the respondents are a member of the particular social group" of family members of children with disabilities. Pet. App. 37a. As did the agency, the court treated the harm to her child as relevant to determining whether Victoria herself was persecuted. See *id.* at 37a-39a. The Court of Appeals disagreed with the agency on only one point: Where the agency determined that the Tchoukhrovs' treatment amounted to "discrimination" but not "persecution," *id.* at 39a, the Court of Appeals held that "the record compels the conclusion that the harm suffered by the Tchoukhrovs constituted persecution within the meaning of 8 U.S.C. § 1101(a)(42)." *Id.* at 20a. That factbound decision, which broke no new legal ground, does not warrant this Court's review – much less the summary reversal the Government seeks.

A. The Facts

1. The Tchoukhrovs' Persecution – In 1991, Victoria and Dmitri Tchoukhrov married and conceived a son. Administrative Record ("A.R.") 332. In October 1991, Victoria went

into labor and delivered her baby at the state-owned hospital in Vladivostok, Russia. *Id.* at 200. After inducing Victoria, hospital staff abandoned her for the entire night, during which time her unborn child was deprived of oxygen. *Id.* The next morning, Victoria's induced labor had stopped and the hospital personnel decided to forcibly extract Victoria's baby from her body; they broke his neck in the process. *Id.* Victoria's body was "virtually mutilated" as they forced the baby out of her "with no regard to [her] safety." *Id.* at 201. As a result of this grossly botched delivery, Victoria's son, Evgueni, suffered a severe spinal injury that caused cerebral palsy. *Id.* at 200.

Instead of giving the newborn child medical care, the hospital initially threw Evgueni into a container holding abortion and other medical waste. A.R. at 201.[1] Victoria, having "lost a lot of blood," fell into a state of unconsciousness. *Id.* When she regained consciousness, the hospital refused to show Victoria her new son. *Id.*

Despite being cast aside with the medical waste, Evgueni survived. *Id.* Victoria pleaded to see her son. *Id.* at 93-94, 201. She was told that he was severely disabled and that she should "refuse" him, because "they didn't see the reason why he needed to live." *Id.* at 92, 99. For the first five days of her son's life, the state hospital barred Victoria from seeing her newborn son. *Id.* at 93. Finally,

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[1] The Government asserts (Pet. 17 n.4) that this fact should not have been considered by the Court of Appeals. But Victoria Tchoukhrova's affidavit, which contains this fact, is a part of the record in this case and was expressly considered by the immigration judge. Pet. App. 33a. Indeed, the immigration judge discussed Victoria's affidavit and swore her to its contents during a hearing. A.R. 85-88. Victoria did not present further evidence on this point because the immigration judge specifically stated that "it appears to me, from my review of the case, that the facts are relatively clear and I don't think we need to go through seven hours of testimony to confirm these facts." *Id.* at 80. Because the immigration judge found Victoria credible and the Board affirmed that finding, see p. 9, *infra*, the circumstances surrounding her son's birth were properly considered by the Court of Appeals.

Victoria managed to convince a nurse to let her visit her child in the middle of the night because she "wanted desperately to see him and to hold his lifeless body close to [her] heart." *Id.* at 201. Victoria snuck into a room where her son was held separately from the healthy infants. *Id.*

Throughout this time, the state hospital pressured the Tchoukhrovs to give up their son. A.R. at 94-95, 201. The Tchoukhrovs refused. Despite their objections, the government forcibly separated Victoria from her son by transferring Evgueni to an institution for orphaned children with birth defects.[2] *Id.* at 95, 202. The government refused the new parents permission to see their son for two months. *Id.* at 96-97.

The state continued pressuring the Tchoukhrovs to sign a document ceding their parental rights. *Id.* at 202. Even in her weak state, Victoria wrote letters, made phone calls, and visited agency after agency trying to fight for the right to bring her own child home. *Id.* at 201.

When the Tchoukhrovs finally gained entrance to the "hospital" for children with birth defects, the conditions were horrifying. A.R. at 97. The children were wrapped in old, wet, dirty linens and cried out from hunger. *Id.* No one cleaned or otherwise took care of them. Some children writhed in pain but received no treatment. *Id.* at 97-98. Notwithstanding intense pressure from state authorities to consent to Evgueni's permanent institutionalization, Victoria and Dmitri secured his release after two months and put him in a private clinic. *Id.* at 99-100, 202.

When Evgueni was one year old, he was diagnosed as having infantile cerebral palsy. *Id.* at 100-101. The Russian government then labeled him disabled and (because

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[2] Although the Government describes that institution euphemistically as a "government hospital for children" (Pet. 7), that rosy depiction is belied by the immigration judge's own description of the "deplorable" conditions where Evgueni was "confined" for two months and "deprived of his parents" – children were "wrapped in old and dirty linen," "wet and dirty," "not properly fed" or even cleaned. Pet. App. 34a-35a.

his mother would not permit him to be vaccinated due to his compromised immune system) barred any public medical support for his condition. *Id.* at 203. The government also refused to allow the Tchoukhrovs to enroll Evgueni in public school, even though his disability was physical, not mental. *Id.* at 101, 202.

Evgueni's government doctor told the Tchoukhrovs that if they refused to institutionalize their son, he should "be isolated at home" and not taken out into public places. A.R. at 101-102. Indeed, when Victoria took Evgueni out in public, people verbally abused and spat upon them. *Id.* at 203. Victoria "often" heard parents say to their children: "Get away from that boy, can't you see he's abnormal" or "Don't get near him, he's sick." *Id.* at 332.

Twice, Victoria watched as strangers assaulted her young son so severely that he required hospitalization, and the Russian government refused to do anything about it.[3] During one visit to the park when Evgueni was six, several young men attacked him. *Id.* at 203. Victoria witnessed the men break Evgueni's arm and cause severe head trauma that required hospitalization for two months and led to insomnia, spontaneous crying, shaking, and paranoia. *Id.* Although Victoria and Dmitri filed a police report, government authorities did not investigate. *Id.* at 121. On another occasion, a woman yelled at Victoria, "Get your ugly imbecile out of here," and shoved Evgueni to the ground. *Id.* at 127, 332. He was rushed to the emergency room and received several stitches in his head, from which

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[3] The Government's statement that the two incidents of violence were "not mentioned in [Victoria's] asylum application" (Pet. 7) is simply not true. They are specifically mentioned in Victoria's Affidavit incorporated into her asylum application. A.R. 195, 200-204. Moreover, it is beside the point: The immigration judge specifically found "that the respondent explained adequately why she did not place all of the alleged past persecution incidents in her initial asylum application." Pet. App. 33a. And he made specific findings of fact regarding the two incidents of violence. *Id.* at 36a.

he still has a visible scar. *Id.* at 127. Victoria again filed a police report; this time, the police told her the matter was insignificant and that she should settle it herself. *Id.* at 332. After these incidents, Evgueni became so frightened that he refused to leave the house. *Id.* at 128, 333.

As the family faced continued harassment and violence and continued government pressure to institutionalize or isolate Evgueni, Victoria and Dmitri decided to take political action. They joined with other parents of disabled children and founded an association "that opposed the prevailing oppressive conditions of the handicap [sic] children," called "Mothers-Unite!" A.R. 202. Victoria worked toward the publication of a newspaper article criticizing the Russian government's treatment of disabled children, but the proposed article was cancelled at the last minute. *Id.* at 203. The couple spoke to the authorities about the treatment of children with disabilities and wrote letters demanding equal rights. *Id.* at 115, 201-202.

The family also sought help from the Moon Society; this action only provoked additional harassment. *Id.* at 117, 203. After one meeting, people threw stones at Victoria and vandalized the family's car. When Dmitri complained to the police, the authorities failed to respond. *Id.* at 203. In 1997, Dmitri was fired from his job as a civil engineer and was unable to find employment for two years; during several job interviews, Dmitri was urged to stop advocating for the disabled. *Id.* at 117-118, 203.

Facing continued hostility toward the family and certain that they would never be able to adequately protect their son, the Tchoukhrovs left Russia for the last time. *Id.* at 90-91.[4] The family entered the United States on September 9, 2000. *Id.* at 90.

2. The Persecution of People with Disabilities in Russia – Two reports in the administrative record provided

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[4] Prior to this last departure, Victoria and Evgueni had traveled to the United States twice for medical treatment. A.R. 90.

additional context and corroboration for the Tchoukhrovs' claim of persecution. The United States Department of State's country report for Russia found that children with disabilities are "removed from mainstream society and isolated in state institutions." A.R. at 241. It further found that "the prospects of children/orphans who are disabled physically or mentally are extremely bleak. The label of 'imbecile' or idiot, which signifies 'uneducable,' is almost always irrevocable. The most likely future is a lifetime in state institutions." *Id.* at 242.[5] The report noted that "[b]eing disabled is still a serious social stigma in the country, an attitude that profoundly influences how institutionalized children are treated." *Id.* In state institutions, "many disabled children are confined to beds around the clock or to rooms that are lit, heated, and furnished inadequately." *Id.* at 243.

The Department of State relied in part on a report prepared by Human Rights Watch. See A.R. at 242-243. That report found that Russian parents of children with even minor disabilities (such as "mild Down syndrome, cerebral palsy, and correctable conditions such as club foot and cleft palate") "are routinely pressured at the maternity ward to give up such infants." *Id.* at 270. Once placed in asylum-like institutions, or "*internaty*," the children "are exposed to shocking levels of cruelty and neglect." *Id.* at 254; see also *id.* at 258-259 (stating that "examples of inhuman and degrading treatment are all too common features of Russian orphanages, both for children with severe disabilities, and as well for those diagnosed as 'educable'"). The report singled out the harm to children with disabilities as especially severe (*id.* at 254):

> Once officially labelled as retarded, Russian orphans face another grave and consequential violation of their rights around the age of four, when

[5] The immigration judge specifically incorporated the relevant sections of the State Department's report in his decision. Pet. App. 38a.

> they are deemed "ineducable," and warehoused for life in psychoneurological *internaty*. In addition to receiving little to no education in such *internaty*, these orphans may be restrained in cloth sacks, tethered by a limb to furniture, denied stimulation, and sometimes left to lie half-naked in their own filth. Bedridden children aged five to seventeen are confined to understaffed lying-down rooms as in the baby houses, and in some cases are neglected to the point of death. Those who grow to adulthood are then interned in another "total institution," where they are permanently denied opportunities to know and enjoy their civil and political rights.

According to the Human Rights Watch report, those practices reflect the persistence of "Soviet-era policies" regarding the institutionalization of children. A.R. at 267. Even after the closing of the Gulag, the report concluded, the Russian government confines children with disabilities to "another archipelago of grim state institutions." *Id.* at 253.

B. Proceedings Below

In late January 2001, without any legal assistance, Victoria Tchoukhrova applied for asylum and withholding of removal. See A.R. at 323-333. Victoria listed both her son Evgueni and her husband Dmitri as derivative applicants. See *id.*[6] Under the relevant statute, an individual who is "unable or unwilling to return" home "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion," 8 U.S.C. § 1101(a)(42)(A), is eligible for asylum. See 8 U.S.C. § 1158. An applicant need not prove that he *will* be persecuted if returned to his

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[6] She also applied for relief pursuant to the Convention Against Torture, but she has since abandoned that claim. See Pet. App. 9a n.2.

country; all he must show is a "reasonable possibility" of persecution, *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987), and past persecution raises a presumption of future persecution, see 8 C.F.R. § 1208.13(b)(1). While the decision to grant asylum is discretionary, withholding of removal is mandatory; the Attorney General may not remove a person to a country where his or her "life or freedom" would be threatened in a country of removal because of race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. § 1231(b)(3). To qualify for withholding of deportation relief, an applicant must show a "clear probability of persecution," *viz.*, that it is "more likely than not" that he or she will be persecuted if deported to his or her home country. See *INS v. Stevic*, 467 U.S. 407, 429-30 (1984).

1. Administrative Proceedings – In April 2001, the Tchoukhrovs appeared before the immigration judge. A.R. 65-75. Victoria renewed her claims for asylum and withholding of removal. *Id.* at 73. The matter was continued for a merits hearing. *Id.* Before the hearing, Victoria filed a new asylum application providing a more detailed description of her asylum claim, including her past persecution and fear of future persecution if removed to Russia. *Id.* at 191-204; see *id.* at 73.[7]

At the outset of the merits hearing, the immigration judge admitted all the exhibits, including Victoria's asylum application and supporting affidavit, without any objection. A.R. 78. Significantly, the Government trial attorney made no objections to the admissibility or relevance of Victoria's sworn statement, which detailed harm to both herself and Evgueni. See *id.* at 200-204.

[7] Victoria's pretrial brief reiterated that she was seeking asylum based on both past persecution and her fear of future persecution in Russia. A.R. 182-183. Thus, the Government was squarely on notice that the then-current country conditions in Russia would be an important issue at the merits hearing.

Victoria testified in support of her application. A.R. 83-157. Although her testimony focused largely on the mistreatment of her son as evidence of her own persecution, the Government never objected once on relevance grounds. See *id.* At the hearing's conclusion, the immigration judge stated: "I agree with everything you say, I believed everything you said." *Id.* at 161-62.

Although the Government briefly cross-examined Victoria, it presented no evidence whatsoever. A.R. 138-150. The Government opposed Victoria's claim on the basis that the "problems" in Russia did not rise to the "level of persecution as enumerated in the statute." *Id.* at 159. The Government voiced no other grounds for its opposition. *Id.* Never did it raise the issue of changed country conditions, even when uncertain of the immigration judge's ultimate decision.

At the conclusion of the hearing the immigration judge issued a decision. He first addressed the issue of credibility and found Victoria's testimony "to be plausible, internally consistent, sufficiently detailed, and responsive to questions." Pet. App. 33a. Although he found that at times Victoria stated "broad *opinions* concerning possible past persecution" that may have been exaggerated, *id.* (emphasis added), he found her testimony regarding *facts* to be credible: "On the whole, I find the respondent was a credible witness." *Id.*

The immigration judge next discussed the circumstances Victoria and her family faced in Russia. Pet. App. 34a-39a. He concluded that the Tchoukhrovs were "member[s] of the particular social group described above," *viz.*, a family with a "severely disabled" child or child with a "debilitating disability." *Id.* at 34a, 36a, 37a. The immigration judge further found "that *the respondent and her family and child* did suffer harm in Russia" and "that this harm was a result of the fact that the respondents are a member of the particular group." *Id.* at 37a (emphasis added).

All of the social-group-related harm the immigration judge discussed involved the treatment of Evgueni, see Pet. App. 34a-39a,[8] but he did not reject Victoria's claim on that ground (nor did the Government so request). Rather, he concluded that the harm "d[id] not rise to the level of persecution." *Id.* at 37a. In particular, the immigration judge ruled that "[t]he fact that the respondent's son was unable to get the quality of medical treatment that he can secure in the United States is not persecution." *Id.* The Russian government, he concluded, simply "does not have the resources to provide medical attention to individuals at the same standards as in developed nations." *Id.* at 38a. The immigration judge found it "more troubling" that "the respondent's child was prevented from attending public schools." *Id.* at 37a. But he again determined that the Russian government "does not appear to have sufficient resources to educate handicapped children." *Id.* at 38a. Although the immigration judge ultimately found "that there is substantial discrimination against individuals with disabilities in Russia," he concluded that "that discrimination does not rise to the level of persecution." *Id.* at 39a. The immigration judge therefore denied all relief and ordered the Tchoukhrovs removed.

The Tchoukhrovs timely appealed to the Board of Immigration Appeals. See 8 C.F.R. § 1003.1(b)(9) (authorizing such appeals). In opposition, the Government filed a four-sentence brief that described the immigration judge's decision as "dispositive of all issues" regarding Victoria's asylum appeal. A.R. 17. The Board summarily affirmed

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[8] The immigration judge did discuss Victoria's allegations that her husband, Dmitri, lost his job, but the judge found that "[t]here was no evidence to show that there was a connection between the respondent's husband being laid off and the fact that the respondent has a political opinion and is a member of a particular social group." Pet. App. 37a. The immigration judge also discussed Victoria's allegations that people threw stones at her when she attended a Moon Society meeting, but again he found no connection between that incident and her social group membership. See *id.* Victoria appealed those findings.

the immigration judge's decision in its entirety. Pet. App. 28a-29a. The summary affirmance invoked the Board decision *In re Burbano*, 20 I. & N. Dec. 872, 874 (B.I.A. 1994); see Pet. App. 29a. Under *Burbano*, 20 I. & N. Dec. at 874, the "Board's final decision may be rendered in a summary fashion" when the "Board's conclusions upon review of the record coincide with those which the immigration judge articulated." When the Board invokes *Burbano*, it adopts the immigration judge's decision in its entirety. In contrast to a streamlining decision under 8 C.F.R. § 1003.1(e)(4)(ii), which affirms only "the result reached" below as correct, without "imply[ing] approval of all of the reasoning of that decision," *id.*, a *Burbano* affirmance adopts both the reasoning and result of the immigration judge's decision. See *Burbano*, 20 I. & N. Dec. at 874; see also *Gishta v. Gonzales*, 404 F.3d 972, 980 (6th Cir. 2005).

2. *Judicial Review Proceedings* – The Tchoukhrovs petitioned for review in the United States Court of Appeals for the Ninth Circuit. A.R. 6. Before the Court of Appeals, the Government argued that substantial evidence supported the agency decision. See App., *infra*, at 42a-53a. However, in the event the circuit court found that substantial evidence did not support the immigration judge's findings on past and future persecution, the Government requested a remand for the agency to consider whether the past conduct or future fear was "on account of" a social group or political opinion. *Id.* at 50a-53a.[9] Significantly, the Government did not request or even suggest a remand for

[9] The Government erroneously asserted that the agency had not previously considered the "on account of" question. See Pet. App. 37a (finding that the Tchoukhrovs "suffer[ed] harm," and that "this harm was a result of the fact that the respondents are a member of the particular social group described above," but concluding that the harm "does not rise to the level of persecution"). Notably, the Government in its petition for certiorari has abandoned the request for a remand on the "on account of" issue.

consideration of changed country conditions or the possibility of relocation. Indeed, the Government did not suggest a remand for any issue other than the "on account of" requirement. *Id.* The Government also argued that any issues not briefed by Tchoukhrova to the Court of Appeals should be deemed abandoned and waived. *Id.* at 30 n.6 (citing *United States v. Tisor*, 96 F.3d 370, 376 (9th Cir. 1996) and *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir. 1991)).

The Court of Appeals granted the petition for review. Pet. App. 1a. In its ruling, the court agreed with most of the agency's analysis. In particular, the court "agree[d] with the legal conclusion of the immigration judge and the BIA that disabled children and their parents who provide care for them are members of 'a particular social group.'" *Id.* at 11a. The court also agreed with the agency's "factual findings that Evgueni and his parents were members of that social group, were harmed (directly or indirectly) on account of their membership, and that these harms were inflicted by the Russian government or those whom it was unwilling or unable to control." *Id.* And the court "agree[d] that, as a matter of law, the immigration judge was correct to look at the harms faced by the Tchoukhrovas collectively when evaluating Victoria's application." *Id.* The court disagreed on only one point: "[W]e hold that [the agency's] determination that the harms did not rise to the level of persecution is not supported by substantial evidence." *Id.*

In addressing Victoria's eligibility for asylum and entitlement to withholding, the Court of Appeals ruled that "the harms suffered by a disabled child" are harms that "[m]ay" be "taken into account when determining whether to grant his parent's asylum application." *Id.* at 16a. In so doing, the court simply "agree[d] with the approach taken by the agency." *Id.* The court also agreed with the approach taken by the agency's appellate counsel, who did not devote a single word of their panel brief to contesting the use of evidence of Evgueni's treatment as support for his mother's asylum application. See App.,

infra, at 42a-53a (arguing that Evgueni's treatment did not rise to the level of past or future persecution).

The Court of Appeals described the treatment that, taken cumulatively, "compel[led] the conclusion" that Victoria Tchoukhrova experienced persecution (Pet. App. 20a): Her newborn baby was "treated as [medical] waste and thrown into a pile of human remains." *Id.* He was then "confined against his parents' will" in an institution where the children were treated deplorably. *Id.* at 21a. Once her child was released from the institution, Victoria lived with him as he was denied "any treatment for his cerebral palsy" and any "elementary education." *Id.* at 23a. And her son "remains under constant threat that he will be returned to an *internaty* by the Russian government, as Russia confines both disabled children and adults in 'total institutions.'" *Id.* at 24a. Finally, "the Russian government was 'unwilling or unable'" to keep private individuals from physically assaulting Victoria's son because of his disability. *Id.* at 25a.

Having determined that Victoria had experienced persecution, the court recognized that it would ordinarily remand to permit "the agency to resolve, in the first instance, the question of a 'fundamental change in circumstances' or [whether] there is the possibility of relocation." *Id.* at 26a. But the Government had "made no argument to the agency – or to [the court] – that there has been a fundamental change in circumstances or a possibility of relocation." *Id.* Nor did any evidence to support such a claim appear in the record. *Id.* Accordingly, the court determined that "Victoria has established a well founded fear of persecution." *Id.* The court thus found Victoria eligible for asylum, and it remanded "for the Attorney General to exercise his discretion" with respect to her application. *Id.* The court similarly found Victoria entitled to withholding of removal, and it remanded for the grant of that relief. *Id.* at 27a.

The Government sought rehearing *en banc*. In its petition, the Government argued for the first time that

Evgueni's persecution should not have been considered in support of his mother's asylum application. See App., *infra*, at 13a-16a. It also argued for the first time that the court should remand for consideration of changed circumstances and the possibility of relocation – though the Government still offered no evidence or argument that changed circumstances or the possibility of relocation actually existed. *Id.* at 16a-17a. The court denied rehearing *en banc*. Pet. App. 41a.

REASONS FOR DENYING THE WRIT

The Government argues that the Court of Appeals contravened the principles of *INS v. Ventura*, 537 U.S. 12 (2002) (*per curiam*), and *Gonzales v. Thomas*, 126 S. Ct. 1613 (2006) (*per curiam*), in granting the Tchoukhrovs' petition for review. Indeed, it goes so far as to seek summary reversal, based on what it asserts is "a continuing pattern by the Ninth Circuit" of contravening those principles. Pet. 14. But the Government's objections are misplaced. Whether or not the Court of Appeals has properly taken account of the principles of *Ventura* and *Thomas* in *other* cases, it plainly followed those principles here. Far from creating a "new rule of immigration law" that mandates "reverse derivative asylum," Pet. 16, the Court of Appeals simply followed the agency decision under review in finding the harsh treatment of a minor child to be relevant to his mother's claim of persecution.

Indeed, in arguing that the Court of Appeals should not have considered Evgueni Tchoukhrov's treatment in evaluating his mother's asylum application, it is the Government who is disregarding the *Chenery I* principle on which *Ventura* and *Thomas* rest. See *SEC v. Chenery Corp.*, 318 U.S. 80, 88, 92-95 (1943); see also *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 50 (1983) ("[C]ourts may not accept appellate counsel's *post hoc* rationalizations for agency action."). It is the Government who seeks to disregard the decision the agency actually made.

Far from the kind of straightforward application of *Ventura* and *Thomas* that might warrant a summary reversal, what the Government seeks instead is a radical expansion of those *per curiam* decisions. Under the Government's interpretation, the Government can win an asylum case, but it can never lose. Instead, the reviewing court must always remand to give the Government another bite at the apple. If accepted, the Government's position would relegate reviewing courts in asylum cases to an essentially advisory role, in violation of basic principles of separation of powers. See *Hayburn's Case*, 2 U.S. 408, 2 Dall. 409, 410 n.* (1792). It would also disregard basic principles of waiver and forfeiture of arguments – principles to which the Government, no less than private parties, must adhere.

Stripped of the misleading *Ventura/Thomas* veneer, the Government's argument simply rests on a disagreement with the way the Court of Appeals applied settled law to the particular facts of this case. The agency determined that the treatment of the Tchoukhrovs constituted mere discrimination, rather than "persecution," and the Court of Appeals disagreed. The court's determination was correct. More to the point, however, it is precisely the kind of factbound ruling that is not a proper candidate for the grant of certiorari, much less a summary reversal. See S. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

I. The Decision of the Court of Appeals Does Not Conflict with This Court's Rulings in *Ventura* and *Thomas*

The Government contends that the Court of Appeals violated the principles of *Ventura*, *supra*, and *Thomas*, *supra*, in two respects. First, it contends that the Court of Appeals "reached out to create a new rule of immigration law" – specifically, "a rule of reverse derivative asylum."

Pet. 16. It argues that *Ventura* and *Thomas* required the court to remand and permit the agency to decide whether to adopt such a rule. Second, the Government contends that *Ventura* and *Thomas* required the Court of Appeals to remand for a determination of changed circumstances or the possibility of relocation – even though the Government had *never*, at the agency stage or before the panel, argued that changed circumstances or the possibility of relocation existed. *Id.* at 18-20. Although the Government makes no assertion that the Court of Appeals' decision creates a conflict in the circuits, it contends that the decision is so egregiously erroneous as to warrant summary reversal. But the Court of Appeals committed no error here, much less an egregious one. Because the Government merely seeks error correction – and there is simply no error to correct – the *Ventura/Thomas* issue does not warrant this Court's review.

A. The Court of Appeals Created No "New Rule" of "Reverse Derivative Asylum"

1. Contrary to the Government's assertions (Pet. 16), the Court of Appeals neither "reached out" nor created "a new rule of immigration law." The Court of Appeals, expressly following the reasoning of the agency decision under review, simply held that "the harms suffered by a disabled child" are harms that "[m]ay" be "taken into account when determining whether to grant his parent's asylum application." Pet. App. 16a. That "common sense" ruling (*id.* at 17a), which accords with other circuit and agency decisions, created no hard-and-fast "rule of reverse derivative asylum." Cf. Pet. 21. Nothing in *Ventura* or *Thomas* required the Court of Appeals to remand before making it.

Ventura and *Thomas* presented a scenario that is far removed from this case. In both *Ventura* and *Thomas*, the Court of Appeals ruled on an issue that the agency itself had *never considered* in the decision under review. In *Ventura*, the Board of Immigration Appeals had ruled that

the asylum applicant failed to show "'that he face[d] persecution 'on account of' a qualifying ground.'" *Ventura*, 537 U.S. at 15. Although the Government had also argued that circumstances had changed "to the point where no realistic threat of persecution currently existed," *id.* at 13, the Board did not pass on that argument. When the Court of Appeals reversed the agency's "on account of" ruling, the court went on to consider and decide the changed-circumstances issue even though the Board did not decide it first. See *id.* at 15.

In *Thomas*, the Board ruled that the applicants were not eligible for asylum based on persecution on account of their race (and perhaps political opinion). *Thomas*, 126 S. Ct. at 1613-1614. On review, the *en banc* Court of Appeals held that the applicants *were* eligible for asylum – not based on their race or political opinion, but based on their membership in the "particular social group" of persons related to "Boss Ronnie," a notoriously racist and harsh foreman at a South African company. *Id.* at 1613-1614. But the Board had never had a chance to "consider[] whether Boss Ronnie's family presents the kind of 'kinship ties' that constitute a 'particular social group.'" *Id.* at 1615.

In both cases, this Court held that the Court of Appeals erred by deciding issues as a matter of first view, without giving the agency an opportunity to "make an initial determination" of those issues. *Ventura*, 537 U.S. at 17; *accord Thomas*, 126 S. Ct. at 1615. Applying the *Chenery I* doctrine that "a judicial judgment cannot be made to do service for an administrative judgment," *Chenery*, 318 U.S. at 88, this Court concluded that the Court of Appeals was required to remand to permit the agency "to address the matter in the first instance in light of its own expertise." *Ventura*, 537 U.S. at 17; see *Thomas*, 126 S. Ct. at 1615.

Unlike in *Ventura* and *Thomas*, the Court of Appeals here did not act before the agency made "an initial determination" of the relevance of a child's persecution to a

mother's asylum application. To the contrary, the Court of Appeals simply *affirmed* the agency's determination that such persecution *is* relevant. As we have shown above, virtually all of the evidence of Victoria's persecution presented at the hearing and discussed by the immigration judge involved the treatment of Evgueni. See pp. 8-9, *supra*. Yet he did not reject the asylum application on the ground that evidence of a son's barbaric treatment was irrelevant to a mother's claim of persecution – nor did agency counsel object to the relevance of that evidence. Indeed, the immigration judge explicitly relied on and evaluated that evidence. He rejected the application for the sole reason that the harsh treatment of Evgueni in Russia amounted only to "discrimination" and not to "persecution." See pp. 9-10, *supra*. And the Board, in its *Burbano* affirmance, did not merely agree with the result but instead adopted the immigration judge's ruling as its own. See pp. 10-11, *supra*. Although the Court of Appeals disagreed with the agency as to whether "persecution" existed, it simply followed the agency's own analysis of the relevance of a child's treatment to a mother's claim of persecution. Nothing in *Ventura* and *Thomas* requires a court to remand to the agency before *agreeing* with the agency's analysis of an issue.

Quoting one of the judges who dissented from the denial of rehearing below, the Government asserts that the immigration judge and the Board of Immigration Appeals would "surely be shocked at the suggestion" that they deemed Evgueni's treatment to be relevant to the question whether Victoria experienced persecution. Pet. 16 n.3 (quoting Pet. App. 51a) (internal quotation marks omitted). But that effort at mind-reading itself runs afoul of the *Chenery I* doctrine. As *Chenery* held, a court must "confin[e its] review to a judgment upon the validity of the grounds upon which the [agency] itself based its action." *Chenery*, 318 U.S. at 88. Here, the agency plainly did not base its judgment on the grounds the Solicitor General suggests – that Evgueni's treatment is irrelevant to Victoria's showing of persecution – but instead based its judgment on

the ground that the treatment amounted only to discrimination and not persecution. The agency consistently treated the evidence of Evgueni's treatment as relevant to Victoria's showing of persecution. The Solicitor General may wish that the agency had not done so, but *Ventura* and *Thomas* are not vehicles for opportunistic remands based on "too-late formulations, apparently coming from the Solicitor General's office." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 422 (1971) (separate opinion of Black, J.). Rather, those cases, and the *Chenery* doctrine they apply, enforce the principle that the agency's decision must stand or fall based on the agency's own analysis, and not that of counsel. The Court of Appeals followed that principle here.

The Government's arguments might be closer to the mark if the Court of Appeals had in fact created a "rule of reverse derivative asylum." Pet. 21. Under such a rule, all parents whose children experienced persecution would presumably be eligible for asylum on that basis alone, just as all children whose parents experience persecution are entitled to asylum under the derivative asylum regulation. See 8 C.F.R. § 207.7. But the Court of Appeals did not adopt such a rule. To the contrary, it merely determined (as did the agency) that a child's treatment is relevant to his mother's showing of persecution. Pet. App. 16a.

If there were any doubt on that score, the Ninth Circuit's subsequent *en banc* decision in *Abebe v. Gonzales*, 432 F.3d 1037 (9th Cir. 2005), should resolve it. The *Abebe* court, citing *Ventura*, determined that it could not decide the issue of reverse derivative asylum on its own and therefore remanded to the Board. See *id.* at 1043. *Abebe* shows that the Ninth Circuit has adopted no "rule of reverse derivative asylum." Pet. 16. Instead, consistent with *Ventura* and *Thomas*, it has allowed the agency to address in the first instance the relevance of a child's treatment to a parent's showing of persecution. And that is all the Court of Appeals did here.

2. Not only did the Court of Appeals comply with *Ventura* and *Thomas* when it deemed Evgueni's treatment relevant to his mother's showing of persecution; the court was also correct on the merits. To consider a child's treatment in determining whether his mother experienced persecution is, as the Court of Appeals said, simply "common sense." Pet. App. 17a. Family members personally suffer while watching their loved ones harmed.[10] The facts here illustrate the point. To have one's child taken away at birth, left in a bin of medical and abortion waste, and institutionalized against one's wishes in horrific conditions – and to secure his release only to be pressured to reinstitutionalize him – plainly inflicts harm on the parent as well as the child.

The Government asserts (Pet. 20) that the Court of Appeals' decision conflicts with the statute that confers derivative status on a spouse or child of a principal asylum applicant, 8 U.S.C. § 1158(b)(3), and the implementing regulation that states that parents do not get the same derivative treatment, 8 C.F.R. § 207.7(b)(6). There is no conflict. Derivative status under the statute and regulation is accorded automatically *regardless of any harm suffered* by the spouse or child and without regard to the nature or quality of the family relationship. In contrast, the Court of Appeals simply held that the harm to Evgueni as a disabled child – harm that plainly affects his mother in a direct way – was properly considered in adjudicating his mother's claim that she herself was persecuted. Throughout this litigation, Victoria's asylum claim has been based on the violence and severe discrimination faced by her son, her spouse, and herself on account of Evgueni's

[10] The Government's standard-form asylum application recognizes that common-sense point. Each question on that application regarding the basis for the asylum claim begins, "Have you or any member of your family . . . ," followed by requests for information regarding membership in organizations, mistreatment and threats, and arrests and imprisonment. See A.R. 195.

disability – as well as on her concern for her son's special need for a mother, a concern evidenced by her efforts to rescue and care for him. As we have shown, Victoria Tchoukhrova did not advance, nor did the court accept, any principle of automatic eligibility based on harm to one's child.

The Court of Appeals does not stand alone on this issue. Its unremarkable holding is shared by other courts and the Board of Immigration Appeals itself. For example, in *Abay v. Ashcroft*, 368 F.3d 634, 642 (6th Cir. 2004), the Sixth Circuit found a mother eligible for asylum "based on her fear that her daughter w[ould] be forced to undergo female genital mutilation." The court relied on the Board's earlier decision in *In re C-Y-Z-*, 21 I. & N. Dec. 915, 919-920 (B.I.A. 1997), which found that an alien whose spouse was subjected to forced sterilization was eligible for asylum. In *C-Y-Z-*, Board Member Rosenberg wrote a concurring opinion in which she cited an array of authority – including cases from the Board and the First and Ninth Circuits – recognizing that the treatment of the applicant's family members is relevant to the applicant's claim of asylum. *C-Y-Z-*, 21 I. & N. Dec. at 926-927 (Rosenberg, J., concurring). As the *Abay* court noted, numerous agency decisions both prior and subsequent to *C-Y-Z-* have granted relief to parents based on a threat that their children will experience female genital mutilation. See *Abay*, 368 F.3d at 641-642 (citing cases). The decision of the Court of Appeals here is perfectly in line with those decisions.[11]

[11] The Government asserts that the dilemma created for the Tchoukhrov family, the agency, and the courts when a child is eligible for asylum, but not his parents, can be resolved by a discretionary grant of deferred action. Pet. 21-22. But, of course, that option has been available to the Government at all stages of removal proceedings against the family; indeed, it could have exercised its prosecutorial discretion not to initiate removal proceedings against the family in the first place. Yet, the Government has never taken an approach other than seeking the whole family's deportation to Russia.

B. *Ventura* and *Thomas* Did Not Require a Remand on the Issues of Changed Circumstances and the Possibility of Relocation

As the decision below noted, "the INS made no argument to the agency – or to [the Court of Appeals] – that there has been a fundamental change in circumstances or a possibility of relocation." Pet. App. 26a. Although the Government's panel brief sought a *Ventura* remand on one issue, it was not the issue of changed circumstances or relocation. Instead, the Government sought a remand only on the question whether the Tchoukhrovs' harsh treatment was "on account of" their social group membership – an argument it abandoned in its petition for certiorari. See App., *infra*, at 50a-53a.[12] The Government has therefore waived the changed circumstances and relocation issues. In any event, neither *Ventura* nor *Thomas* required the Court of Appeals to remand to permit the agency to address them.

1. As the Government itself argued below, failure to present issues on appeal constitutes a waiver of those issues. See p.12, *supra*. That settled and fundamental principle applies not only to asylum applicants, but to the Government as well. "[I]t is no less good morals and good law that the Government should turn square corners in dealing with the people than that their people should turn square corners in dealing with the Government." *United States v. Winstar Corp.*, 518 U.S. 839, 886 n.31 (1996) (internal quotation marks omitted).

The Government suggests that it did not litigate the changed circumstances and relocation issues below because the immigration judge did not find past persecution

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[12] The Government suggests that it *did* ask for a broad remand on "the remaining unaddressed issues to the Board." Pet. at 20. It did no such thing. It asked for a remand on one narrow issue. See App., *infra*, at 50a-53a. The Government's inaccurate suggestion to the contrary is disappointing.

– "so there was nothing to rebut." Pet. 19. That assertion presumes that the Government knew the eventual outcome of the case even before the parties finished litigating the merits. But at the time the Government presented its evidence, it obviously had no way of knowing how the immigration judge would ultimately rule.

Indeed, mid-hearing, the immigration judge stated that Evgueni's inability to attend public education "potentially rises to the level of persecution." A.R. 133. The immigration judge then gave the Government the opportunity to present any evidence it wanted. *Id.* at 160. Yet, despite the possibility of a past persecution finding, the Government presented no evidence on either changed conditions in Russia or possible internal relocation. Nor did it cross-examine Victoria on the two subjects. The Government's four-sentence brief to the Board similarly failed to address those issues. *Id.* at 17. The Government simply did not raise the changed circumstances and relocation issues before the agency at all.

Nor did the Government raise the issues before the Court of Appeals – at least not until it lost before the panel and filed its petition for rehearing. There is no excuse for the Government's failure to at least flag the issues as requiring a remand. The Government's suggestion that it did not raise the issues because the court had no authority to decide the "merits" of those issues in the first instance (Pet. 19) is a *non sequitur*. It is, of course, entirely possible to raise an issue and request a remand on the topic without litigating its "merits" on appeal. Indeed, that is exactly what the Government did in its petition for rehearing.

The Government presented no evidence or arguments on changed conditions or internal relocation to the immigration judge; made no arguments to the Board on those issues; failed to ask the Court of Appeals for a remand on those issues; and then raised them only after losing on appeal. The Government has waived the changed circumstances and relocation issues, and it may not raise them here. See *United States v. United Foods, Inc.*, 533 U.S.

405, 416-417 (2001) (refusing to consider Government's argument that was not properly presented to the Court of Appeals).

2. Even if the issue were properly before this Court, nothing in *Ventura* and *Thomas* required the Court of Appeals to remand on the changed circumstances and relocation issues. The Government asserts that the decision below reflects the "*exact same* legal error that prompted summary reversal in *Ventura* itself." Pet. at 19. But the Government ignores the fundamental differences between *Ventura* and this case.

Unlike here, the Government in *Ventura* explicitly argued the changed circumstances issue to the immigration judge. Cf. *Ventura*, 537 U.S. at 12. The Board ruled against the asylum applicant on different grounds and never reached the changed circumstances argument. See *id.* at 15. Before the Ninth Circuit, both sides noted that the Board had not considered the Government's alternative argument. See *id.* at 13. "And both sides asked that the Ninth Circuit remand the case to the BIA so that it might do so." *Id.* Instead, the Ninth Circuit "evaluated the Government's claim itself" and, based on a State Department report submitted five years earlier, held that the record evidence failed to rebut any presumption of persecution. *Id.* at 14.

Unlike *Ventura*'s fact-finding on appeal, the decision below declined to remand on the issue of changed country conditions for an entirely different reason – the Government's failure to litigate or even raise the issue before the agency. See Pet. App. 26a. Consistent with well-established principles of waiver, the Court of Appeals refused to permit the Government to belatedly raise new defenses for the first time on appeal: "when the INS makes no argument before the immigration judge or the BIA concerning changed conditions, we do not remand." Pet. App. at 26a. See also *Ghebremedhin v. Ashcroft*, 392 F.3d 241, 243 (7th Cir. 2004) (disagreeing "that *Ventura* stands for the broad proposition that a court of appeals must

remand a case for additional investigation or explanation once an error is identified" in *all cases*).

Nothing in *Ventura* suggests that a court must permit the Government to raise new defenses for the first time on appeal. Nor does *Thomas* require a remand here. In *Thomas*, the Court of Appeals held that the applicants' family constituted a "particular group" even though the applicants had not litigated that theory before the agency beyond simply checking the relevant box on their asylum application. See *Thomas*, 126 S. Ct. at 1613-1614; *Thomas v. Gonzales*, 409 F.3d 1177, 1191 (9th Cir. 2005) (*en banc*) (Rymer, J., dissenting), rev'd sub nom. *Gonzales v. Thomas*, 126 S. Ct. 1613 (2006). Because the agency did not rule on that theory, and the Government had never had a chance to respond to it at the agency level, this Court held that a remand was required. See *Thomas*, 126 S. Ct. at 1615.

Here, by contrast, the changed circumstances and relocation issues were always relevant to the case, and the Government had a chance to raise them throughout the administrative proceedings. Unlike in *Thomas*, the Court of Appeals here simply declined to have the Board consider a claim that the Government had waived by failing to assert it in a timely fashion before the agency. That refusal was in accord with well-settled administrative law principles. See *Woodford v. Ngo*, 126 S. Ct. 2378, 2385-2386 (2006) (citing cases applying general administrative law principle that issues must be raised before the agency in a timely manner).

3. By reading the *Chenery I* doctrine, as applied in *Ventura* and *Thomas*, to require a remand to permit it to present defenses that it failed to raise in the initial administrative proceedings or even before the panel of the Court of Appeals, the Government seeks a radical extension of that doctrine. Under its position, the Government can win an asylum case, but it can never lose – if the Court of Appeals rules against the agency, it must always remand to permit the Government to raise new issues and arguments

to justify its earlier decision. But this Court has held that "*Chenery* does not require that we convert judicial review of agency action into a ping-pong game." *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969).[13]

Ventura and *Thomas* merely applied the *Chenery I* doctrine. They did not mandate that whenever a Court of Appeals considers the facts of a case and exercises its acknowledged power of judicial review, its holdings must be referred back for the agency's concurrence. That would contravene basic separation of powers principles. See *Hayburn's Case*, 2 U.S. 408, 2 Dall. 409, 410 n.*; see also *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113-114 (1948) ("It has also been the firm and unvarying practice of Constitutional Courts to render no judgments not binding and conclusive on the parties and none that are subject to later review or alteration by administrative action."); *Alaska Dept. of Environmental Conservation v. EPA*, 540 U.S. 461, 512 (2004) (Kennedy, J., dissenting) ("The principle that judicial decisions cannot be reopened at the whim of the Executive or the Legislature is essential to preserving separation of powers and judicial independence."). *Ventura* and *Thomas* require that the agency have the first crack at the issues of a case. They do not give the agency veto power over the interpretive role of the judicial branch. *Ventura* and *Thomas* sought to preserve the separation of powers, not destroy it.

In short, as the Seventh Circuit has noted, see *Ghebremedhin*, 392 F.3d at 243-244, there is nothing in *Ventura* (or *Thomas*) that requires a Court of Appeals to remand to give the agency another bite at the apple as a matter of course whenever it finds an agency decision

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[13] This Court has previously rejected a rule that would give applicants the power to generate "endless delay" by freely reopening asylum cases. *INS v. Abudu*, 485 U.S. 94, 108 (1988). The Government's reading of *Ventura* and *Thomas* would give the Government that same power.

erroneous. And there is certainly nothing in those cases that requires the Court of Appeals to remand to permit the Government to raise a claim that it passed up a prior opportunity to raise. The Court of Appeals' refusal to remand here therefore does not warrant this Court's review, much less summary reversal.

II. The Government's Challenge to the Court of Appeals' Persecution Determination Does Not Warrant Review

In two sentences, the Government challenges the Court of Appeals' conclusion that the record established not merely discrimination but "persecution." See Pet. 17. Although the Government suggests that the Court of Appeals violated *Ventura* and *Thomas* in deciding the persecution issue, there is no basis for such a suggestion. When it adopted the immigration judge's ruling as its own, see pp. 10-11, *supra*, the Board of Immigration Appeals plainly "ma[d]e an initial determination" of the persecution issue. *Ventura*, 537 U.S. at 17. The Court of Appeals merely exercised its acknowledged power to "determine whether [the agency's] decision exceeds the leeway that the law provides," *id.*

When the *Ventura/Thomas* veneer is stripped away, the Government's argument against the persecution holding appears as nothing more than a factbound challenge to the lower court's "substantial evidence" determination. In particular, the Government contends that the Court of Appeals "rel[ied] on unsubstantiated allegations in the record that the immigration judge did not rely upon" and "ignor[ed] other portions of the record in critical respects." Pet. 17 & nn.4-5. Such a narrow, fact-specific argument affords no basis for this Court's review, on summary reversal or otherwise. See S. Ct. R. 10.

In any event, the "persecution" determination of the Court of Appeals was entirely correct. The evidence that Victoria Tchoukhrova's son was disposed of as medical waste after his birth is not "unsubstantiated" (cf. Pet. 17 n.5); rather, it appears in a sworn affidavit that the immigration judge specifically declared to be part of the record. See n.1, *supra*. Nor was the evidence of the two violent attacks on Evgueni "unsubstantiated" (cf. Pet. 17 n.5). The immigration judge specifically found that those attacks occurred (Pet. App. 35a); he simply disagreed with the conclusion that they amounted to persecution. In evaluating the "record . . . as a whole," *INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992), the Court of Appeals was not only entitled but obligated to consider those two pieces of evidence.

Nor did the Court of Appeals ignore evidence in the record. The court acknowledged the immigration judge's conclusion that Evgueni's deprivation of medical treatment and education was not so complete as to constitute persecution (cf. Pet. 17-18 n.5), but it simply disagreed with that conclusion, particularly when the evidence of medical treatment and education was considered in conjunction with the other ways in which Evgueni had been treated harshly in Russia. Pet. App. 23a-24a. And the Court of Appeals hardly ignored the record by referring to the hospital in which Evgueni was institutionalized as an "*internaty*." Cf. Pet. 18 n.5. The Human Rights Watch report, properly in the record, A.R. 252-292, documents similarly deplorable conditions in both *internaty* and "baby houses." Whatever name is used, the immigration judge explicitly found that the conditions at the "hospital" in which Evgueni was "confined" and "deprived of his parents" were "deplorable," with children "wet and dirty," "not properly fed," and some "crying in pain." Pet. App. 34a-35a.

As the Court of Appeals properly concluded, the record establishes a series of undisputed events that, when considered in their totality, establish that Victoria suffered not just discrimination, but persecution. Specifically, she (a) learned her newborn son was discarded as medical waste; (b) was barred from seeing her son for several days after his birth; (c) had her son taken to a government facility against her will and involuntarily held for months; (d) witnessed the squalid conditions in which her son spent the first months of his life; (e) was denied the right to enroll her son in public school; (f) watched as her son was ridiculed and subjected to violence that the authorities refused to investigate; (g) was spat upon herself when in public with her son; and (h) became a virtual prisoner in her own home due to the extreme societal and governmental prejudice against her disabled son. See pp.1-5, *supra*.

It is morally outrageous and legally flawed to suggest that a parent does not suffer harm so severe as to constitute persecution when her newborn child is taken against her will, institutionalized in squalor, and subjected to gross mistreatment and abuse. On the undisputed, compelling facts of this case, the Court of Appeals was clearly correct to conclude that the facts mandated a finding of persecution. Even if it were appropriate for this Court to address such a narrow, fact-specific issue, there would be no basis to review, much less reverse, the lower court's correct decision here.

CONCLUSION

The petition for a writ of certiorari should be denied.

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August 4, 2006

Corrected Copy
No. 03-71129

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VICTORIA TCHOUKHROVA, et al.,

Petitioners,

v.

ALBERTO R. GONZALES, Attorney General,

Respondent.

PETITION FOR REVIEW OF AN ORDER
OF THE BOARD OF IMMIGRATION APPEALS

RESPONDENT'S PETITION FOR REHEARING EN BANC

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INTRODUCTION

Creating an irreconcilable conflict with circuit and Supreme Court precedent, contravening numerous statutes and regulations, violating fundamental principles of separation of powers, and disregarding the most basic precepts of administrative law, a panel of this Court issued a ground-breaking decision that invented a brand-new form of immigration relief. According to the panel,

someone who has never been persecuted before and faces no fear of future persecution can nonetheless obtain asylum through actions taken solely against the applicant's offspring. This decision finds no support in the text of the statute, the decisions of the Board of Immigration Appeals, or the jurisprudence of any court of appeals. What is more, the issue was not even raised by the parties, but only by the panel *sua sponte*, with no exhaustion of remedies, no prior agency decision, and no briefing on the question. Accordingly, the Attorney General respectfully requests rehearing *en banc*.

The decision warrants *en banc* review for several reasons. First, the panel's newfangled means of obtaining asylum which the panel refers to as "reverse-derivative" asylum, is contrary to the relevant statues and regulations and is [sic] tension with decisions of this Court. Second, by considering unexhausted claims, the decision is in direct conflict with circuit precedent and the plain text of the Immigration and Nationality Act, both of which prohibit jurisdiction over unexhausted questions raised for the first time on review. Third, the opinion repeatedly violates the Supreme Court's decision in *INS v. Ventura,* 537 U.S. 12 (2002), which prohibits the Court from reaching asylum questions that were not decided by the agency in the first instance. Finally, the panel's decision presents a question of exceptional importance, because it has the potential to affect the outcome of a large number of asylum cases and raises sensitive questions of the relationship between the judicial power of review and the Executive Branch's duty to implement the law.

STATEMENT

1. Asylum is discretionary relief that is available if "the Attorney General determines" that an alien is a "refugee," 8 U.S.C. § 1158(b)(1), *i.e.*, is someone who is unable or unwilling to return to her country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion." 8 U.S.C. § 1101(a)(42)(A). Regulations direct that "the applicant" must prove that "*he or she* has suffered past persecution" or "*he or she* has a well-founded fear of future persecution," 8 C.F.R. §§ 1208.13(a), (b) (emphasis added). These regulations codify a core principle of our asylum law – that asylum is for persecution of the "applicant," not someone else. "[H]e or she" must have suffered the past persecution or fear future persecution.

Moreover, although a separate statutory provision permits particular family members to derive asylum from a relative's claim, this provision is expressly limited to cover only a "spouse" or "child" of an alien who has been granted asylum. 8 U.S.C. § 1158(b)(3); *see also* 8 C.F.R. §§ 1208.21(a)-(g). No one else can derive asylum from the principal applicant. 8 U.S.C. § 1158(b)(3). Thus, a parent can accord derivative asylum to a minor child, but not the reverse.[1]

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[1] A child may apply for asylum in his own right, *see Gonzalez v. Reno*, 212 F.3d 1338, 1248-50 (11th Cir. 2000), depending on various considerations such the child's age, whether he is accompanied or alone, and whether his parents support or oppose the application. *Id.*; *Polovchak v. Meese*, 774 F.3d 731 (7th Cir. 1985).

Likewise, mandatory withholding of removal is available if "the Attorney General determines" that an "alien's life or freedom would be threatened . . . because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3). Again, numerous regulations require "the applicant" to prove "his or her life or freedom would be threatened," that is, "it is more likely than not" that "he or she would be persecuted" in the future. 8 C.F.R. §§ 1208.16(b); (b)(2). There is no statute or regulation authorizing derivative withholding of removal.

2. Victoria Tchoukhrova ("Tchoukhrova") is a female native of Russia who has a child with cerebral palsy. In 2001, she applied for asylum and withholding of removal asserting persecution on account of her "political opinion" (opposing treatment of disabled persons in Russia) and "membership in a particular social group" ("women involved in organized protest against human rights/children rights violations" or "[p]arents of children born with severe disabilities"). AR 180-81, 191-204. Her reasons for seeking asylum, though understandable for a caring mother, were unquestionably insufficient under our asylum laws. In her asylum application, she admitted that she did not fear "organized persecution," but rather "continuous discrimination and abuse." And she candidly conceded that she wanted asylum so her son could get "continuous treatment" from an osteopath in San Diego and so he could attend a public school with a special physical education instructor, speech teacher, and equipment. AR 328-33.

Tchoukhrova testified that in 1991 her son Evgueni was born with cerebral palsy due to a "trauma of the spin[al] cord." Because of the condition, medical personnel told Tchoukhrova that he was not likely to survive, and

her baby was transferred to a "government hospital" without her consent. She conceded that, at the hospital, "he had been treated," but was "pretty sure he was isolated." She could not visit him for two months. AR 92-93, 95, 97.

Fortunately, her child did survive, but at age one, he was diagnosed with cerebral palsy. To obtain medical care for him, Tchoukhrova visited a San Diego osteopath three times between 1994 and 1995. AR 100, 104, 144-46, 202-03, 332-33. After that, however, Tchoukhrova could not get Russia to pay for return visits to San Diego. In 2000, she liquidated her assets, moved to San Diego, and applied for asylum. AR 118, 332-33.

It is important to note that, in Russia, despite the government's meager resources to assist disabled persons, AR 242, Tchoukhrova's child had his own "personal [government] pediatrician" and received hospitalization with adequate treatment and medicines. AR 100, 104, 110-11, 113, 120. Tchoukhrova nonetheless felt that Russian medical care was substandard because her son "lack[ed] . . . the therapy that normal kids can have" and was not "treated normally and according[] to his conditions."[2] AR

[2] A 2000 State Department Report incorporated a Human Rights Watch report on conditions in "Russian [o]rphanages." AR 242, 256-79. The reports shows there are over 600,000 "abandoned children" (called "social orphans") whose parents have "abandoned" them to be raised by the state because of social problems like poverty, joblessness, illness, or because children are disabled. One third (200,000) of these "orphans" or "social orphans" live in "orphanages." AR 254, 265. Placement depends on a state diagnosis of "orphans" at age four. There are orphanages for educable "[n]ormal" orphans; educable mildly retarded orphans ("oligophrenic debil"); and a "psychoneurological internaty" for uneducable, severely retarded orphans ("imbetsile" or "idiot") aged 5 to 17, who are transferred to adult "internaty" at the age of 18, with a life of

(Continued on following page)

113. Because of the child's cerebral palsy, he was not admitted to "regular school," and instead was "offere[d] home studies with a visiting teacher." AR 103, 333. He also encountered some discrimination. "Because the public . . . [did not] see [handicapped] kids very often, they [did not] understand how to react to the child." AR 103. Some parents told their children not to play with the son, and in 1997 a woman "pushed" him because he touched her laundry. The boy fell, cut his scalp, and needed stitches. That same year, three "young lads" ran with the boy and "dropped him on the ground," which broke his arm, caused a concussion, and required hospitalization for two months. AR 119-20, 127.

Significantly, Tchoukhrova did not testify of many adverse experiences of her own. She said that she joined the Moon Society, and once a crowd threw rocks at her car as she left a society meeting. And in 1997, her husband was laid-off from work and was advised there could be problems if he stayed "in this society." AR 116-18.

3. Accordingly, the IJ denied Tchoukhrova asylum and withholding of removal. The IJ correctly stated that the application was Tchoukhrova's, with her spouse and child "dependent upon that application." AR 52-53. And the IJ found that "the harm suffered by [Tchoukhrova] did not rise to the level of persecution." AR 59. The inability to

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"total institution." AR 258, 266-68. Five percent (30,000) of Russia's orphans are in these "internaty." "Orphan care varies broadly across Russia, making it very difficult to draw conclusions about cities, regions, or even classes of institutions," AR 268, but there were reports of serious abuses in some "internaty." AR 267-68. The Government has "meager resources" to assist disabled persons; it gives priority to disabled World War II and other veterans. AR 242.

"get the quality of medical treatment available in the United States was not persecution," AR 59, and the restriction on attending public school was simply due to "Russia'[s] . . . dire economic straits" and "[in]sufficient resources to provide adequate schooling for handicapped children." AR 60-61. Further, the IJ did not credit Tchoukhrova's testimony that her son was "refused" medical care." The IJ found that the testimony was "exaggerated" and "not true." AR 54, 57, 110-11. Finally, the IJ found that although there is "substantial discrimination against individuals with disabilities," "discrimination does not rise to the level of persecution." AR 61. Thus, the IJ concluded that Tchoukhrova failed to establish either past persecution or a well-founded fear of future persecution. AR 59-61.

The Board of Immigration Appeals ("BIA") dismissed Tchoukhrova's appeal. The BIA concluded that, while there was a "sympathetic family history," the "lead respondent [Tchoukhrova]" did not adequately demonstrate that "she was a victim of past persecution" or "she has a well-founded fear or faces a clear probability of . . . persecution in her country." AR 10.

4. At oral argument, the panel (*Reinhardt,* Tashima, Wardlaw) questioned who should be treated as the asylum applicant. After Tchoukhrova's counsel described the derivative-asylum scheme which permits a child to derive asylum from a parent but not vice versa, the panel suggested that the law needed some type of "reverse-derivative" asylum from the child to the parents. The panel also noted that, if the law were ambiguous, the Court could clear it up.

Subsequently, the panel issued a published decision reversing the denial of relief and ruling that Tchoukhrova

was eligible for asylum and withholding of removal based on her son's persecution, even if she were not independently eligible for relief in her own right. 404 F.3d 1190-92, 1194-95. The panel did so by "imputing the disabled child's harms to the parent filing an application for asylum on behalf of the family members." *Id.* at 1190. In effect, the panel created the "reverse-derivative" asylum it had suggested at oral argument, with asylum running from a child to a parent. *Id.* The panel raised this issue as a "threshold procedural question," acknowledging the question was not "expressly" "discuss[ed]" by the agency. *Id.* at 1190.

According to the panel, it was taking a "pragmatic approach," which enabled it to ignore the law's distinctions between principal and derivative asylum. *Id.* at 1192. Attempting to justify this atextual approach, the panel stated that caring for families is a purpose underlying our immigration laws and that enforcing the law as written would be "cruel" as applied to disabled children and their parents. *Id.* At [sic] 1190-92. Additionally, the panel cited to four Ninth Circuit decisions in the past ten years that had not "formalistically divided the claims between 'principal' and 'derivative' applicants but instead, without discussion, have simply viewed the family as a whole." *Id.* at 1192. Thus, the panel determined that "a parent of a disabled child may file as a principal applicant . . . and may establish her asylum claim on the basis of the persecution inflicted or feared by the [derivative] child." *Id.* The panel then proceeded to find that the record "compel[led]" the conclusion that the son experienced cumulative "harms" constituting persecution, based in part on de novo fact-finding, and conclusions that have no basis in the record.

Specifically, the panel alluded to: (1) an "attempted disposal of the newborn child as medical waste," being "discarded along with aborted fetuses" at birth;[3] (2) his two month "involuntary confinement" as a newborn in an "internaty" depriving him of his "right to be free;"[4] (3) "the state's refusal to provide [the child] with an elementary or other education" and "the government's refusal to provide medical care,"[5] (4) the child "remains under the constant threat that he will be returned to an internaty by the Russian government;"[6] and (5) "violence on the part of individual citizens" which "the immigration judge failed to even mention" (the IJ found there were two incidents but held there was no persecution). *Id.* at 1192-95.

The panel then concluded that Tchoukhrova was persecuted in the past by imputation from the boy, and this triggered the presumption that Tchoukhrova had a well-founded fear of future persecution. *Id.* at 1195-96.

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[3] This was de novo factfinding and an unexhausted claim. It was asserted once, in one of two asylum declarations and never mentioned again. AR 201. There was no testimony or finding to this effect, and no claim of error or appeal objecting to lack of such a finding.

[4] This misportrays the record. The IJ found, and Tchoukhrova testified, that this was a "hospital." AR 56, 95. The undisputed documentary evidence was that an "internaty" is an orphanage for "abandoned" "orphans" from 5 to 17 years old who have been diagnosed as "uneducable" because of severe mental impairment. AR 258, 267.

[5] This misportrays the record. It was undisputed that Russia provided home schooling with a visiting teacher. AR 333. The IJ found there was no denial or refusal of medical care. AR 54, 57, 110-111. Tchoukhrova got medical care for the child. She simply disagreed with it and thought it was substandard. AR 100, 104, 110-113, 120.

[6] This misportrays the record. The panels' "risk" of future "internaty" confinement is contrary to the evidence that the son is not a "abandoned," not an "orphan," not diagnosed as severely retarded or ineducable – which are the persons in "internaty." AR 258, 267.

Although the issue was never presented to the BIA, the panel proceeded to find, de novo, that the presumption of future persecution was not rebutted. Consequently, the panel held that Tchoukhrova was eligible for asylum and withholding of removal, and that her spouse and son could derive such relief as well. *Id.* at 1195-96.

DISCUSSION

This decision warrants *en banc* review for several reasons.

1. First, the panel has invented a whole new theory of asylum eligibility running from child to parent. Under this theory, a person can be eligible for asylum without enduring past persecution or having a risk of actual future persecution. By contrast, under asylum and withholding regulations, Tchoukhrova had to prove that "she has suffered past persecution," or "she [sic] has "a well-founded fear of future persecution," in order to qualify for asylum. 8 C.F.R. §§ 1208.13(a), (b). Moreover, while under the derivative scheme a "child" may derive asylum from a principal parent, the child's status is expressly dependent on "principal alien's" status. 8 C.F.R. §§ 1208.21(a)-(g). This means that the child stands in the shoes of the parent; his application rises or falls on the parent's. Contrary to this scheme, instead of looking at the persecution of Tchoukhrova, who was the asylum applicant, the panel treated the dependent son's derivative claim as controlling, and looked to his harm concluding that he had been persecuted. 404 F.3d at 1192-95. The panel then imputed the derivative child's harm to Tchoukhrova, and concluded that this made her eligible for asylum, without having to establish that she, herself, suffered past persecution or has a well-founded

fear or clear probability of persecution, contrary to our law. 1192, 1195-96. The panel thus reversed the operation of our derivative laws, in effect having the derivative child's claim control the principal parent's claim, and then permitted Tchoukhrova to be eligible without any persecution of herself, violating the principal applicant scheme.

The panel's violation of the principal and derivative asylum schemes, and invention of this new theory of asylum eligibility, creates a conflict with case law in this Circuit applying the law as written. This court has held that when a derivative child's application is part of a family unit's, the resolution of the parent's application will govern that of the minor child, not the reverse as the panel has decided. *See Yang v. INS*, 79 F.3d 932, 933 (9th Cir.)., *cert. denied* 222 US 222, (1996); *Fisher v. INS*, 79 F.3d 966 (9th Cir. 1994) (en banc) (where son's asylum status derives from mother's application, court "will focus on the status of [the mother]"). *Cf. Ochave v. INS*, 254 F.3d 859, 864 (th [sic] Cir. 2001) (derivative claims "stand or fall" on principal's claim). The cases the panel cited in support of its invented position actually show a conflict with its position, since in accordance with the law as written, in these cases the parent or spouse established a persecution claim in his or her own right from which the other family members could lawfully derive asylum. *Kaiser v. Ashcroft*, 390 F.3d 653 (9th Cir. 2004); *Maini v. INS*, 212 F.3d 1167 (9th Cir. 2000); *Singh v. INS*, 94 F.3d 1353 (9th Cir. 1996); *Prasad v. INS*, 47 F.3d 336, 339 (9th Cir. 1995). Moreover, the panel's decision conflicts with circuit case law recognizing that there is no derivative withholding of removal. *Ali v. Ashcroft*, 394 F.3d 780, 782 n. 1 (9th Cir. 2005).

2. Rehearing *en banc* is also warranted because the panel's decision is in direct conflict with case law of this

Circuit and the Supreme Court's decision in *Ventura*. The basic legal principles are clear. Congress has delegated to the Executive Branch the authority to establish, within reasonable bounds, the requirements for asylum and to decide whether it is to be granted. 8 U.S.C. §§ 1158(a), (b)(1), (d)(1). The Attorney General has established legal standards for asylum eligibility by means of case-by-case adjudication, *see INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), and by regulations. 8 U.S.C. §§ 1103(a)(3), 1158(b)(1), (d)(1). Both are entitled to *Chevron* deference. *INS v. Aguirre-Aguirre*, 435 415, 414 (1999). *See Chevron, U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 845 (1984). "In such circumstances a 'judicial judgment cannot be made to do service for an administrative judgment'." *Ventura*, 511 U.S. at 17 (quoting *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943)). The Court is not "empowered to conduct a de novo inquiry . . . and reach its own conclusions." *Id.* (quoting *Florida Power & Light Co. v. Lorian*, 470 U.S. 729, 744 (1985).

a. Protecting the Executive Branch's authority, Congress has prohibited courts from reviewing unexhausted questions not raised before the agency. 8 U.S.C. § 1252(d)(1) ("[A] court may review a final order of removal only if . . . the alien has exhausted administrative remedies available to the alien as of right."). The exhaustion requirement ensures that the Executive Branch has the opportunity to resolve questions before judicial intervention. *See Zara v. Ashcroft*, 383 F.3d 927, 931 (9th Cir. 2004). Under this circuit's case law the Court has no jurisdiction to decide unexhausted questions raised for the first time on review. *Barron v. Ashcroft*, 358 F.3d 674, 677 (9th Cir. Cir. 2004); *Zara*, 383 F.3d at 931. In order to exhaust remedies a claim must have been raised before

the BIA. *Zara*, 383 F.3d at 931; *Farhoud v. INS*, 122 F.3d 794, 796 (9th Cir. 1997).

The panel's decision is in conflict with this case law. Here, the panel reversed the agency's denial of relief based on a new "threshold" question that the panel raised for the first time on review about whether to impute Tchoukhrova to be eligible based solely on persecution of her child. Tchoukhrova never raised such a claim before the agency. This is a new, unexhausted question raised by the panel for the first time on review. Thus, the panel's decision is in direct conflict with the case law of this circuit precluding determination of unexhausted questions.

b. The panel's decision also conflicts with the Supreme Court's decision in *Ventura*. 537 U.S. at 15-17, not once but three times. First, the panel concedes that the agency did not "expressly" "discuss[]" the new "threshold" question whether Tchoukhrova would be imputed to be eligible for asylum based solely on persecution of her child. 404 F.3d at 1190-91. And the suggestion that the agency took the same "pragmatic approach," *id.* at 1192, is a "hollow reed." At no point in the IJ's or BIA's decisions do they take the panel's invented approach that Tchoukhrova was (or would be) reversely eligible for asylum solely by imputation from her derivative son – without establishing that she was persecuted in the past or faces future persecution. The Court's violation of *Ventura* is serious and far-reaching. It pertains to a question of statutory construction as to the meaning of our principal and derivative asylum laws affecting all cases, not just Tchoukhrova's.

Second, after engaging in de novo factfinding, the panel should have remanded to the agency for it [sic] consider whether these facts amounted to persecution. Third, under

the regulations, a finding of past persecution only gives rise to a presumption of a well-founded fear or clear probability of future persecution, which the government can then rebut by showing changed personal or country circumstances, or "the applicant" could relocate elsewhere. 8 C.F.R. §§ 1208.13(b)(1)(A) and (B); 1208.16(b)(1). After finding that Tchoukhrova sustained past persecution, the panel should have remanded to the BIA for a determination of whether the government rebutted, or could rebut, the presumption. *Ventura*, 537 U.S. at 15-17. The panel refused to do this and reached the issue deciding it in the first instance. To correct these errors, the Court should grant rehearing en banc.

3. Finally, rehearing en banc is warranted because this case presents a questions [sic] of exceptional importance. Over the years asylum and withholding of removal have taken on increasing prominence in our immigration system. In 1984 there were 11,000 asylum applications filed with the Executive Office of Immigration Review (which is the agency for the BIA and IJ's). As of March 1998, there were nearly 33,800 asylum and withholding of deportation cases pending at EOIR. In the last two years, EOIR has had between 60,000 and 80,000 applications. The invention of a new form of asylum and withholding eligibility – changing the fundamental operation of the principal and derivative laws – therefore presents an important issue in the ongoing administration of our Nation's immigration laws. In addition, the panel's decision raises serious questions about the fundamental relationship between the court's power of review and the Executive Branch's congressionally mandated duty to administer the statutory scheme. And this decision enters

into the sensitive areas of the political relationship between the United States and a foreign sovereign.

CONCLUSION

For the foregoing Respondent requests that the Court grant its petition for rehearing *en banc*.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Circuit Rule 35-1 or 40-1, the attached petition for rehearing en banc is:

X Proportionally spaced, has a typeface of 14 points or more, and contains 3856 words (petitions and answers must not exceed 4,200 words).

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CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2005, two copies of the foregoing **Corrected Copy of Respondent's Petition For Rehearing En Banc** were served on Petitioner's counsel by first class mail, postage prepaid, by depositing them in the Department of Justice mail system for same day mailing, addressed to:

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NO. 03-71129

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VICTORIA TCHOUKHROVA, ET AL.,

A75 772 599, 600, 601

Petitioners,

v.

JOHN ASHCROFT, ATTORNEY GENERAL,

Respondent.

PETITION FOR REVIEW OF AN ORDER OF
THE BOARD OF IMMIGRATION APPEALS

BRIEF FOR RESPONDENT

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No. 03-71129

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VICTORIA TCHOUKHROVA, ET AL.,
A75-772-599, 600, 601,

Petitioners,

v.

JOHN ASHCROFT, Attorney General,

Respondent.

BRIEF FOR RESPONDENT

STATEMENT OF JURISDICTION

This is an immigration case in which petitioners, Victoria Tchoukhrova, Dmitri Tchoukhrov, and Evgueni Tchoukhrov ("petitioners"), seek review of a final order of removal issued by the Board of Immigration Appeals ("the Board").[1] A.R. at 1.[2] The Board affirmed an Immigration Judge's decision that petitioners were removable from the United States pursuant to section 237(a)(1)(B) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1227(a)(1)(B)(2000), for remaining in the United States

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[1] Petitioner, Victoria Tchoukhrova, was the lead asylum applicant before the Board with petitioners Dmitri Tchoukhrov and Evgueni Tchoukhrov being derivative asylum applicants.

[2] The abbreviation "A.R." refers to the Certified Administrative Record on file with the Court.

for a period longer than authorized.[3] The Board further affirmed the Immigration Judge's finding that petitioners were ineligible for asylum and withholding of removal under sections 208(a), and 241(b)(3) of the INA, 8 U.S.C. §§ 1158(a), 1231(b)(3). The Board also found that petitioners abandoned their application for withholding of removal under the Convention Against Torture ("CAT") because they failed to challenge the Immigration Judge's denial of their CAT application before the before the [sic] Board.[4]

The Board's jurisdiction arose under 8 C.F.R. § 1003.1(b)(3) (2003), which grants the Board appellate jurisdiction over decisions of Immigration Judges in removal proceedings initiated by the former Immigration and Naturalization Service ("INS").[5]

Because petitioners were placed in removal proceedings after April 1, 1997, the Court's jurisdiction is governed by INA § 242(a), 8 U.S.C. § 1252(a). Petitioners are subject to a final order of removal issued by the Board; therefore, pursuant to INA § 242(a), this Court has jurisdiction to review this matter. *Aragon-Ayon v. INS*, 206 F.3d 847 (9th Cir. 2000). Under this statute, a petition for

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[3] Unless otherwise indicated, citation to the United States Code will be the latest official 2000 version.

[4] This refers to Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, [annex. 39 U.N. GAOR Supp. (No. 51 at 197, U.N. Doc. A/39/51 (1984)], *entered into force* June 26, 1987, which has been implemented by regulations promulgated by the Attorney General. *See* 8 C.F.R. §§ 208.16, 18 (2002).

[5] On March 1, 2003, the INS ceased to exist as an agency within the Department of Justice and its functions were transferred to the Department of Homeland Security. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, 110 Stat. 2135 (Nov. 25, 2002).

review is timely if filed not later than 30 days after the date of the final order of removal. INA § 242(b)(1), 8 U.S.C. § 1252(b)(1). The Board entered its final order of removal on February 25, 2003, and petitioners filed their Petition for Review on March 13, 2003. The Petition for Review was filed not later than 30 days after the date of the final order of removal and is therefore timely.

ISSUES PRESENTED

1) Whether substantial evidence supports the Immigration Judge's finding that petitioners were not persecuted in the past in Russia and, to the extent they were mistreated while living in that country, it was the result of discrimination, an unprotected ground under the INA.

2) Whether substantial evidence supports the Immigration Judge's decision that petitioners did not have a well-founded fear of future persecution in Russia where their claims were wholly speculative, and are not supported by any evidence in the record, and the evidence does not "compel" a contrary conclusion.

3) Whether this Court should remand the case should it find that substantial evidence does not support the Immigration Judge's finding that petitioners were not persecuted in the past, or have a well-founded fear of future persecution in Russia, so the agency can consider in the first instance whether the conduct petitioners experienced in the past, or fear in the future in Russia is "on account" of one of the five grounds set forth in the INA.

STATEMENT OF THE CASE

Petitioners are natives and citizen of Russia, who entered the United States on or about September 9, 2000, as a [sic] nonimmigrant visitors authorized to remain in the United States until March 8, 2001. A.R. 338, 353, 367. On March 20, 2001, Notices to Appear ("NTA") were issued by the INS charging petitioners with being removable from the United States, pursuant to section 237(a)(1)(B) of the INA, for remaining in the United States for a period longer than authorized. A.R. 339, 354, and 368.

In a hearing before an Immigration Judge, on April 9, 2001, petitioners admitted the factual allegations, conceded they were removable as charged in the NTAs, A.R. 68, and indicated they wanted to apply for asylum, withholding of removal, and protection under CAT and, in the alternative, voluntary departure. A.R. 68 [sic] On August 8, 2001, after a hearing on the merits, an Immigration Judge denied petitioners' applications for asylum, withholding of removal, and relief under CAT finding petitioners failed to establish they were persecuted in the past in Russia, or had a well-found [sic] fear of future persecution in Russia on account of their political opinion, or membership in a particular social group. A.R. 59-64. The Immigration Judge also found petitioners failed to establish they would be tortured if returned to Russia and, therefore, denied their application for protection under CAT. A.R. 62-63.

On February 25, 2003, the Board adopted and affirmed the Immigration Judge's decision, and dismissed the appeal.[6] A.R. 13.

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[6] This Court lacks subject matter jurisdiction to consider the Immigration Judge's denial of petitioners' applications for CAT

(Continued on following page)

STATEMENT OF THE FACTS

A. Proceedings Before the Immigration Court.

The Immigration Judge's decision contains a description of the documentary exhibits and a summary of the testimony offered at petitioners' removal hearing. *See* A.R. 34-43. In view of the Immigration Judge's detailed summary of the testimony, respondent incorporates those portions of the Immigration Judge's decision as the description of the evidence and its statement of the facts.

B. The Decision of the Immigration Judge.

On August 8, 2001, the Immigration Judge denied petitioners' applications for asylum, withholding of removal, and protection under CAT finding petitioners were not persecuted in the past in Russia, and that they failed to establish they had a well-founded fear of future persecution in Russia. A.R. 51-63. The Immigration Judge also found petitioners were ineligible for protection under CAT because they failed to establish they would be tortured if they were returned to Russia. *Id.* After setting forth the standards for asylum, withholding of removal, and CAT,

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protection since they failed to challenge that denial before the Board and, therefore, failed to exhaust their administrative remedies on that claim. *See* 242(d)(1) of the INA, 8 U.S.C. § 1252(d)(1) (requiring exhaustion of administrative remedies as a prerequisite for review); *Farhoud v. INS*, 122 F.3d 794, 796 (9th Cir. 1997); *Vargas v* [sic] *INS*, 821 F.2d 906, 907 (9th Cir. 1987). In addition, petitioners in their brief failed to address this claim in their brief to the Court and, therefore, have abandoned that claim before this Court. *See United States v. Tisor*, 96 F.3d 370, 376 (9th Cir. 1996) (failure to brief an issue raised in section heading results in waiver of right to appeal); *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir. 1991) (failure to brief an issue in a timely fashion may constitute waiver of the issue on appeal).

the Immigration Judge denied petitioners' requests for relief, finding petitioners failed to meet their burden of proof of establishing past persecution, or a well-founded fear of future persecution in Russia, or the possibility of being subject to torture in that country. A.R. 59-63. The Immigration Judge found that petitioner Victoria Tchoukhrova was a credible witness, but was prone to exaggerate the facts in her case. A.R. 54. The Immigration Judge found petitioners' claims of political persecution in Russia were based on petitioner Victoria Tchoukhrova's opposition to the Russian government's policies toward providing services for persons with disabilities, which she expressed on a few occasions to a group of parents of disabled children in Russia, her attempts to publish a newspaper article in Russia criticizing the Russian government's treatment of disable persons in Russia, and her having joined the Moon organization. A.R. 55.

The Immigration Judge also found petitioners' [sic] alleged they were persecuted in the past, and had a well-found fear of future persecution in Russia on account of their membership in [a] particular social group, consisting of the family of a disabled child. A.R. 55. The Immigration Judge also found petitioners claimed their son Evgueni Tchoukhrov, as a disabled child, was persecuted in the past and would be persecuted in the future on account of his membership in a particular social group consisting of "disabled child[ren] in Russia." A.R. 58.

The Immigration Judge indicated, in dicta, that petitioners "appear[ed]" to have been harmed in Russia on account of their being members of a particular social group (as a family with a disabled child), but did not actually address or decide the social group issue in his decision, and instead found that petitioners' past

experiences did not rise to a level of conduct constituting persecution under the INA. A.R. 59. The Immigration Judge found the "fact that the [petitioners'] son was unable to get the quality of medical treatment that he [could] secure in the United States is not persecution." A.R. 59. The Immigration Judge also found that petitioners' child did receive medical treatment in Russia, but that the petitioners did not agree it was the proper treatment for their child. A.R. 57. While the Immigration Judge found it "troubling" that petitioners' disabled child was unable to attend public school in Russia, the Immigration Judge found that it was "unclear" from the record why that was the case. A.R. 59. The Immigration Judge found there were several possible explanations shown by the record. A.R. 59-60. He speculated that on [sic] possible explanation was that the Russian government was "attempting to punish handicapped people by preventing them from attending public school." A.R. 59. However, relying on evidence of country conditions found in the record, the Immigration Judge found that "it could also be concluded from the facts in this case that the Russian government [did] not have sufficient resources to provide adequate schooling for handicapped children." A.R. 60. The Immigration Judge found that this explanation was supported by a U.S. Department of State country report on Russia, dated 2000, contained in the record which showed that "Russia is in dire economic straits," and that "Russia does not appear to have sufficient resources to educate handicapped children." A.R. 60.

Relying on the same U.S. Department of State country report, the Immigration Judge found that, in general, children in Russia "are certainly not treated as they are in more developed nations, and that prospects for children

with disabilities are "extremely bleak" in Russia. A.R. 60. Quoting from the same country report, the Immigration Judge found that in Russia "the label of 'imbecile' or idiot, which signifies uneduatable [sic], is almost always irrevocable," and "the most likely future [for such persons] is a lifetime in state institutions." A.R. 60. The Immigration Judge also found that the Russian constitution does not address directly the issue of discrimination against disabled persons, and that, although laws exist in Russia that prohibit discrimination in that country, the Russian government has not enforced them. A.R. 61. Finally, the Immigration Judge noted that to the extent the Russian government does provide assistance for the disabled in Russia, it is directed to miliary [sic] veterans and, that while special institutions exist for children with disabilities in Russia, they do not serve the children's needs adequately. A.R. 61.

Even taking into account the hardships suffered by the disabled in Russia as set forth in the record, the Immigration Judge found that the family's past experiences, while unfortunate, simply did not rise to the level of conduct qualifying as persecution for purposes of asylum. A.R. 61. Instead, the Immigration Judge found that any harm the petitioners suffered while in Russia was the result of discrimination in that country against those with disabilities, not persecution. A.R. 61. The Immigration Judge found that while there is substantial discrimination against persons in Russia with disabilities, discrimination is not persecution under the INA. *Id.*

The Immigration Judge also rejected petitioners' claim that if they were returned to Russia, petitioners' child would be killed, and they would be imprisoned. A.R. 61-62. The Immigration Judge found there claims entirely

speculative and "lack[ing] any factual basis." A.R. 61. In rejecting petitioners' claims of future persecution, the Immigration Judge noted that the petitioners were able to live in Russia without ever being arrested, and that despite pressure from the Russian authorities to institutionalize their disabled child, he was allowed to continue to live with his parents. A.R. 61-62. The Immigration Judge also found the petitioners were allowed to leave Russia on three separate occasions to come to the United States to secure adequate medical treatment for the child. A.R. 62. Based on this evidence, the Immigration Judge found that petitioners failed to establish an objectively well found fear of future persecution. *Id.* The Immigration Judge also found that petitioners failed to establish they would be tortured if returned to Russia and, therefore, were ineligible for protection under CAT. A.R. 62.

C. The Decision of the Board of Immigration Appeals.

On February 25, 2003, the Board adopted and affirmed the Immigration Judge's decision relying on *Matter of Burbano*, 20 I & N Dec. 872, 874 (BIA 1994) (the Board's independent review authority does not preclude the Board from adopting or affirming a decision of the immigration judge, in whole or in part, when we are in agreement with the reasoning and result of that decision). A.R. 13-14. While noting that petitioners "presented a very sympathetic family history," the Board found that the [I]mmigration Judge's [sic] was correct in finding that the petitioners did not demonstrate that they were persecuted in the past, or had a well-founded fear of future persecution in Russia. A.R. 61. The Board also found that the petitioners abandoned their CAT claim because they did not address it to

the Board. A.R. 13. Based on that finding, the Board dismissed petitioners' appeal.

SUMMARY OF THE ARGUMENT

Substantial evidence supports the Immigration Judge's finding that petitioners were not persecuted in the past in Russia and, to the extent they were mistreated while living in that country, it was the result of discrimination, an unprotected ground under the INA.

Substantial evidence also supports the Immigration Judge's finding that petitioners did not have a well-founded fear of future persecution in Russia where petitioners' claims were wholly speculative, and were not supported by any evidence in the record, and the evidence does not "compel" a contrary conclusion.

Alternatively, should this Court find that substantial evidence does not support the Immigration Judge's finding that petitioner [sic] were not persecuted in the past, or have a well-founded fear of future persecution in Russia, this Court must remand petitioners' case to the agency to determine whether the conduct petitioners experienced in the past, or fear in the future was "on account" of one of the five grounds set forth in the INA.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE IMMIGRATION JUDGE'S FINDING THAT PETITIONERS WERE NOT PERSECUTED IN THE PAST, OR HAVE A WELL-FOUNDED FEAR OF FUTURE PERSECUTION IN RUSSIA.

A. Statutory Standard and Burden of Proof

Section 208(a) of the INA, 8 U.S.C. § 1158(a), authorizes the Attorney General, "in his . . . discretion," to grant asylum to an alien who can demonstrate that he is a "refugee" within the meaning of section 101(a) (42) of the INA, 8 U.S.C. § 1101(a)(42). Section 101(a) (42) defines a refugee as an alien who is "unable or unwilling to return to [his country] . . . because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."

If an alien shows he suffered past persecution, the likelihood of future persecution becomes relevant in the exercise of discretion. *In re Chen,* 20 I.& N. Dec. 16, 18 (BIA 1989); *Kazlauskas v. INS,* 46 F.3d 902, 905 (9th Cir. 1995). If an alien establishes he is a "refugee" because of past persecution, then a rebuttable presumption arises that he has reason to fear similar persecution in the future. *Id.* In that situation, the INS ordinarily will have to present evidence rebutting the presumption. *Id.* In assessing the likelihood of future persecution, the BIA has held that a change in circumstances can rebut the presumption of the threat of persecution. *In re Chen,* 20 I. & N. Dec. at 18. On the other hand, in instances of exceptional past persecution, in spite of any change in circumstances, asylum may be granted in the exercise of discretion for compelling humanitarian reasons. *Id.* At the

time of petitioner's deportation hearing, the *Chen* past persecution standard of proof has been codified at 8 C.F.R. § 208.13(b)(1) (1998).

Regarding the well-founded fear standard for future persecution, the BIA in *In re Mogharrabi,* 19 I. & N. Dec. 439 (BIA 1987), held that an asylum applicant must show a "reasonable person in [the petitioners'] circumstances would fear persecution" if returned to his country. The well-founded fear standard requires a showing of genuine subjective fear and a demonstration of credible, direct, specific evidence showing that this fear is objectively reasonable. *Berroteran-Melendez v. INS,* 955 F.2d 1251, 1256 (9th Cir. 1992) (quoting *Rodriguez-Rivera v. INS*, 848 F.2d 998, 1002 (9th Cir. 1988)). This standard has been promulgated by the Attorney General and set forth at regulation 8 C.F.R. § 208.13(b)(2) (1998).

Section 421(b)(3)(A) [sic] of the INA, 8 U.S.C. § 1231(b)(3)(A) provides that an alien shall not be removed if "the alien's life or freedom would be threatened in that country because of an alien's race, religion, nationality, membership in a particular social group, or political opinion." *See also Molina-Estrada v. INA* [sic], 293 F.3d 1089 (9th Cir. 2002). To qualify for withholding of removal, an alien must demonstrate that "it is more likely than not that he would be subject to persecution on one of the specified grounds" set forth in the INA. *Al-Harbi v. INS,* 242 F.3d 882, 888 (9th Cir. 2000) (internal cites omitted). This "clear probability" standard for withholding of removal is more stringent than the well-founded fear standard governing asylum claims. *Id.* The well-founded fear standard for asylum requires less of an evidentiary showing than the clear probability standard for withholding of deportation. *Id.* Accordingly, an alien who fails to show a well-founded fear

of persecution will, by definition, fail to show a clear probability of persecution. *Id.* Upon establishing statutory eligibility, the alien's entitlement to withholding of removal is mandatory. Unlike asylum, withholding of removal cannot be denied in the exercise of discretion. *Al-Harbi v. INS,* 242 F.3d at 888.

The burden of proof is on the petitioner to establish eligibility for asylum and withholding of deportation. *INS v. Stevic,* 467 U.S. 407, 422 n.16 (1984); *Sangha v. INS,* 103 F.3d 1482, 1486-87 (9th Cir. 1997); *Castillo v. INS,* 951 F.2d 1117, 1121 (9th Cir. 1991); *see* 8 C.F.R. §§ 208.13(a), 208.16(b), and 242.17(c)(4)(iii) (1996).

B. Standard of Review

The Immigration Judge's factual findings regarding eligibility for asylum or withholding of removal are reviewed for substantial evidence. *INS v. Elias-Zacarias,* 502 U.S. 478, 481 (1992); *Fisher v. INS,* 79 F.3d 955, 961 (9th Cir. 1996) (en banc). The discretionary denial of asylum is reviewed under the abuse of discretion standard. *Abedini v. INS,* 971 F.2d 188, 191 (9th Cir. 1992); *Vides-Vides v. INS,* 783 F.2d 1463, 1466 (9th Cir. 1986). Credibility findings are reviewed for substantial evidence. *Turcios v. INS,* 821 F.2d 1396, 1399 (9th Cir. 1987).

Given the Attorney General's broad discretion in granting asylum, and the deferential substantial evidence standard of review, this Court has stated both that it will not reverse the BIA merely if it disagrees with the BIA's evaluation of the facts and that it will affirm the BIA if its conclusion is substantially reasonable. *Castillo,* 951 F.2d at 1120; *De Valle v. INS,* 901 F.2d 787, 790 (9th Cir. 1990).

In a further elucidation of the substantial evidence standard in asylum cases, the Supreme Court held in *Elias-Zacarias,* 502 U.S. at 481 & n.1, that if substantial evidence supports the BIA's denial of asylum, the decision can be reversed "only if the evidence . . . was such that a reasonable fact finder would have to conclude that the requisite fear of persecution existed," adding that the evidence would not only have to "support" the reversal, but "compel" it. *See also Abedini v. INS,* 971 F.2d at 191. Thus, the Supreme Court concluded that in order for the BIA's denial of asylum or withholding of deportation to be reversed, the record evidence would have to be "so compelling that no reasonable fact finder could fail to find the requisite fear of persecution." *Elias-Zacarias,* 502 U.S. at 484; *Aruta v. INS,* 80 F.3d 1389, 1396 (9th Cir. 1996). This Court has stated that *Elias-Zacarias* is the "definitive statement" of the substantial evidence standard in asylum cases. *Prasad v. INS,* 47 F.3d 336, 339 (9th Cir. 1995). *See also San[g]ha v. INS,* 103 F.3d 1482, 1487 (9th Cir. 1997).

Questions of law regarding statutory interpretation of the INA are to be reviewed *de novo,* with substantial deference to the BIA. *See INS v. Aguirre Aguirre,* 119 S.Ct. 1439, 1445 (1999).

Finally, review is generally limited to the decision of the Board, except to the extent that it has adopted the decision of the Immigration Judge. *Ghaly v. INS,* 58 F.3d 1425, 1429 (9th Cir. 1995); *Alaelua v. INS,* 45 F.2d 1379, 1382 (9th Cir. 1995); *Elnager v. INS,* 930 F.2d 784, 787 (9th Cir. 1991); *Matter of Bur[b]ano,* 20 I & N Dec. 872, 874 (BIA 1994). Because the Board adopted and affirmed the Immigration Judge's decision, this Court reviews the Immigration Judge's decision. *Id.*

C. Substantial Evidence Supports The Immigration Judge's Finding That The Conduct Petitioners Experienced In The Past Did Not Amount To Persecution.

Petitioners claim that because of their son's disability, they were persecuted on account of their political opinion, and membership in [sic] particular social group in Russia. Pet. Br. at 7-21. However, this calm [sic] is without merit. Instead, a review of the record in this case establishes the petitioners were not persecuted while in Russia and, to the extent they were mistreated while living in that country, it was the result of discrimination, an unprotected ground under the INA. Additionally, petitioners in this case improperly conflate the actions of the Russian government and those of the general population in Russia. However, as set forth below, many of the events relied on by the petitioners cannot be tied to the Russian authorities, or by groups it cannot, or are unwilling to control.

As mentioned earlier, in order to be eligible for asylum an applicant must demonstrate either past persecution, or a well-founded fear of future persecution, on account of one of the qualifying reasons under the INA. *See* 8 U.S.C. §§ 1101(a)(42), 1158; 8 C.F.R. §§ 208.13(b)(1) and (2) (1995). The INA does not define the term "persecution." "In ordinary usage, the term 'persecution' denotes extreme conduct." *Fatin v. INS*, 12 F.3d 1233, 1240 (3rd Cir. 1993). "For example, The Random House Dictionary of the English Language 1444 (2d ed. 1987) defines the term to mean 'a program or campaign to exterminate, drive away, or subjugate a people because of their religion, race, or beliefs[,]' [and there is] nothing indicating that Congress

intended to depart from the ordinary meaning of the term. . . . " *Id.*

The BIA has construed the term to mean "the infliction of suffering or harm upon those who differ (in race, religion, or political opinion) in a way regarded as offensive." *See, e.g., Matter of S-A-,* Int. Dec. 3433, ___ I & N Dec. ___, 2000 WL 827754 (BIA 2000), quoting *Ghaly,* 58 F.3d at 1431; *see also Matter of Acosta,* 19 I & N Dec. 211, 221 (BIA 1985) ("the infliction of suffering or harm on those who differ in a way regarded as offensive"). This is also the meaning given to the term "persecution" in this and other Circuits. *See, e.g., Duarte de Guinac v. INS,* 179 F.3d 1156 (9th Cir. 1999); *Fisher,* 79 F.3d at 961; *Kovac v. INS,* 407 F.2d 102 (9th Cir. 1969).

As this Court has stated, "[p]ersecution is an extreme concept that does not include every sort of treatment our society regards as offensive." *Fisher,* 37 F.3d at 1376. "Discrimination . . . as morally reprehensible as it may be, does not ordinarily amount to 'persecution' within the meaning of the [INA]." *Ghaly,* 58 F.3d at 1431; *see also Bucur v. INS,* 109 F.3d 399 (7th Cir. 1997). "Otherwise hundreds of millions of people would be eligible for asylum in the United States." *Bucur,* 109 F.3d at 402. Not every "bullying" tactic rises to the level of persecution. *Marquez v. INS,* 105 F.3d 374, 379,-80 [sic] (7th Cir. 1997). "Mere repugnance of . . . a governmental policy to our own concepts of . . . freedom [is] not sufficient to justify labeling that policy as persecution." *Fatin,* 12 F.3d at 1240. "If persecution were defined that expansively, a significant percentage of the world's population would qualify for asylum in this country – and it seems most unlikely that Congress intended such a result." *Id.* at at [sic] 1240.

In order to show persecution, an alien must show mistreatment that rises above discrimination, harassment, or even basic suffering. *Cf. Prasad,* 47 F.3d at 337-38 (no past persecution where Indo-Fijian was subjected to religious and ethnic discrimination, rocks were thrown at his house, his wife was harassed by military, and experienced one brief arrest and detention with some physical mistreatment); *Fisher v. INS,* 291 F.3d at 494-95 (8th Cir. 2002) (no past persecution in Ukraine based on activities reviving Lutheran church, where educational and job opportunities were curtailed, salary was cut, church was infiltrated by KGB, and applicant received veiled threats of problems at work if he pursued religious activities); *Mikhailevitch v. INS,* 146 F.3d 384, 389 (6th Cir. 1998) (no past persecution in Communist Belarus based on Roman Catholic beliefs and activities, where believers of all faiths were subject to discrimination, KGB questioned alien on several occasions and conducted searches of home and place of business, and on one occasion arrived at home at 1:00 a.m. and knocked on door for 40 minutes). *Contrast Korablina v. INS,* 158 F.3d 1038, 1039-44 (9th Cir. 1998) (compelling evidence of past persecution in Ukraine of Jewish applicant, based on the robbery and beatings of employers, violent attacks by ultranationalists against Jews, incident in which applicant was tied to chair with noose around neck, threatened with death, and beaten requiring hospitalization, and attacks on family members who were badly beaten or threatened with rape); *Matter of O-Z- and I-Z-,* 22 I & N Dec. 23 (BIA 1998) (past persecution in Ukraine, where Jewish alien faced years of housing and employment discrimination, was physically attacked and beaten on several occasions, received multiple anti-Semitic threats and messages at home, apartment was

vandalized, son was dragged from classroom at school by schoolmates, beaten, and forced to remove his pants).

Also inherent in the concept of "persecution" is the requirement that it must be inflicted by the Government, or by persons the Government is unable or unwilling to control. *Sangha v. INS,* 103 F.3d 1482, 1487 (9th Cir. 1997). Conduct that "the government does not sponsor and in which it is not complicit" does not support asylum. *Rodas-Mendoza v. INS,* 246 F.3d 1237, 1240 (9th Cir. 2001). There is no "persecution" where conduct is not "condoned by the state." *Ghaly,* 58 F.3d at 1431. "[V]iolence completely untethered to a governmental system does not afford a basis for asylum." *Grava v. INS,* 205 F.3d 1177, 1181 n. 3 (9th Cir. 2000). Evidence that the police were ineffective does not suffice. *See Brijmati Singh v. INS,* 134 F.3d 962, 968 (9th Cir. 1997).

Given these standards, substantial evidence supports the Immigration Judge's finding that petitioners failed to establish that the conduct they experienced in the past rose to the level of "persecution."

Petitioners in this case have failed to set forth any facts which establish that they were persecuted while living in Russia. The fact that petitioners' child was not provide [sic] with the level of medical care in Russia that petitioners could obtain in the United States does not amount to persecution. In fact, the record in this case establishes that the petitioners' child was given medical treatment for his disability while in Russia, but that petitioners did not believe it was either sufficient, or the proper therapy for their child. A.R. 110-111. However, the fact that the "proper" medical therapy was unavailable according to petitioner is not persecution.

Nor does petitioners' child [sic] inability to enroll in a public school because of his disability amount to persecution. The record in this case establishes that the Russian economy is having extreme economic problems, and as a result Russia does not have the economic resources to educate handicapped children. A.R. 206, 242. The fact the Russia government decides to use its resources to fund other programs, rather than providing non-institutional medical care for children with disabilities, does not amount to persecution. Furthermore, the petitioners have not establish [sic] that there are no private schools or hospitals in Russia that could assist petitioners' child. In fact, petitioner Victoria Tchoukhrova admitted that her child was [sic] received [sic] private medical care while in Russia. A.R. 100.

Nor does petitioner Victoria Tchoukhoriva's [sic] car being stoned by unknown assailants after she attended a meeting of parents with disabled children amount to persecution. While such an event was unsettling for the petitioner, petitioner was not harmed by her car being stoned, and does not amout [sic] to persecution. *Prasad v. INS,* 47 F.3d at 339-40; *Ghaly v. INS,* 58 F.3d at 1431.

Petitioners also claim that petitioner Dmitri Tchoukhrova lost his job because he had a disabled son. Pet. Br. at 17. However, besides petitioners' unsupported statement, petitioners do not offer any evidence which would support such a conclusion. In fact, the record establishes that petitioner's husband was employed in Russia until 1997, nearly six years after the birth of petitioners' disabled son. A.R. 117-118. Moreover, even if petitioner Dmitri Tchoukhrova lost his job because he had a disabled child, this would not be considered persecution under the INA. *Nagoulko v. INS,* 333 F.3d 1012 (9th Cir. 2003) (being

fired from job did not rise to level of persecution); *Saballo-Cortez v. INS,* 761 F.2d 1259, 1264-65 (9th Cir. 1985) (denial of discounts on food and denial of special work permit not sufficient to establish persecution). In addition, petitioners failed to establish that the government in Russia imposed "deliberate imposition of substantial economic disadvantage upon" them in firing petitioner Dmitri Tchoukhrov on account of one of the protected grounds under the INA. *Kovac v. INS,* 407 F.2d 102 (9th Cir. 1969). Nor do the facts in this case support a claim of severe economic deprivation. *Id*; *Baballah v. Ashcroft,* 335 F.3d 981 (9th Cir. 2003) (severe harassment, threats, violence and discrimination made it virtually impossible for applicant to earn a living). Instead, petitioners traveled several times to the United States and were able to afford private medical care for their child. In addition, petitioner Victoria Tchoukhrova stated that she supported the family by decorating for wealthy families in Russia. A.R. 118.

Petitioners also rely on two incidents in which their son was injured by unknown persons in Russia. During the first instance, petitioners' son was attacked by an unknown group of young men who grabbed their son and were carrying him towards a lake in a park. A.R. 119-121. Petitioner Victoria Tchoukhrova chased after the young men who then dropped petitioners' child. A.R. 119. As a result of being drop[sic], petitioners' child was hospitalized for two months with a broken arm and injuries to his face. A.R. 120. In another incident, petitioners' son was injured by an unknown woman in a park after the woman pushed him down to the ground because he touched an article of her clothing. A.R. 126. Petitioners' son suffered a severe laceration to is [sic] head which required medical treatment at

a hospital. A.R. 127. However, these events to do not amount to persecution. Petitioners have failed to establish, let alone claim, that their son's alleged assailants were part of the government in Russia, or from a group the government was unwilling or unable to control. Nor could they, petitioners admitted they were unable to identify their son's assailants. A.R. 119-120. To the extent petitioners cannot establish their son's assailants were with the government, or a group it could not, or was unwilling to control, the alleged attacks on the petitioners' son were not persecution under the INA. This Court has repeatedly held that persecution under the INA means acts either committed by the government or a group the government was unable or unwilling to control. *Adebisi v. INS*, 952 F.2d 910, 913-14 (9th Cir. 1992) and case cited therein. *See also, Sotelo-Aquije v. Sattery*, 17 f.3d [sic] 33, 37 (2d Cir. 1994) (same); *McMullen v. INS*, 658 F.3d 1312, 1315 & n.2 (9th Cir. 1981); *Matter of Laipenieks*, 18 I & N Dec. 433, 456-57 (BIA 1983) *rev'd on other grounds*, 750 F.2d 1427 (9th Cir. 1985) (persecution under the INA means "[t]he infliction of suffering or harm, under government sanction, upon persons who differ in a way regarded as offensive. . . . "). Nor does the fact that petitioner Victoria Tchoukhrova and her son were subject to derogatory comments on one occasion in a park amount to persecution. *See Lim v. INS*, 224 F.3d 929, 936 (9th Cir. 1999) (mere unfulfilled threats with no evidence of injury, harm or mistreatment do not constitute "persecution.").

While petitioners did not live under ideal conditions in Russia, to the extent that they were mistreated in that country does not amount to persecution. Instead, substantial evidence supports the Immigration Judge's decision that petitioners were victims of discrimination in Russia.

The record in this case establishes that discrimination exists in Russia against children and their families with disabilities. A.R. 242. While respondent does not condone discrimination, a claim of discrimination by itself is not persecution under the Act. *Ghaly v. INS*, 58 F.3d at 1429 ("discrimination on the basis of race or religion, as morally reprehensible as it may be, does not ordinarily amount to "persecution" within the meaning of the Act"); *Bucur v. INS*, 109 F.3d at 402 (7th Cir. 1997) ("discrimination is not persecution"); and *Fatin v. INS*, 12 F.3d at 1243 (3rd Cir. 1993) ([t]he concept of persecution does not encompass every sort of unfair treatment that our society regards as offensive . . . unjust, or even unlawful or unconstitutional.").

D. Substantial Evidence Supports the Immigration Judge's Determination That the Petitioners Failed to Show a Well-founded Fear of Future Persecution in Russia.

Petitioners claim that if they are returned to Russia their son will be killed, and they will be imprison [sic] based on the fact their son is disabled. Petitioners' claim is wholly speculative, and is not supported by any evidence in the record. Petitioners offered no testimony or evidence showing even a remote possibility that their son would be killed, or that they would be imprisoned if returned to Russia. In fact, the record in this case supports an exact opposite conclusion. Petitioners admit that they were allowed to travel back and forth between Russia and the United States on several occasions without any incident. A.R. 122-123. Nor did the Russia [sic] authorities ever attempt to stop their travels to the United States. A.R. 122-123. In addition, the record in this case is completely void of any

evidence that the Russian authorities kill young school-aged children because they are disabled, or imprison their parents for having disabled children. To the extent petitioners claim their child would be "killed" because he would not receive proper medical treatment, nothing in the record supports this claim. Instead, the record in this case establishes petitioners' child had access to public and private medical assistance, and was given emergency medical help on several occasions in Russia. While not to diminish what has happen [sic] to the petitioners in Russia, petitioners nevertheless have failed to establish that they have a well-founded fear of future persecution in Russia.

Alternatively, should this Court find that substantial evidence does not support the Immigration Judge's finding of no past persecution or well-founded fear of future persecution in Russia, this Court must remand petitioners' case to the agency to determine whether the conduct experienced in the past or feared in the future is "on account" of one of the five grounds set forth in the INA. In this case, the Immigration Judge indicated, in dicta, that petitioners "appear[ed]" to have been harmed in Russia as "a result of" their being a member of a particular social group (a family with a disabled child), but did not actually address or decide the social group issue, and instead found that petitioners' past experiences did not rise to the level of conduct constituting persecution under the INA. A.R. 59. Thus, the Immigration Judge made no finding as to whether petitioners were members of a particular social group. In fact, there is no discussion of the legal requirements for establishing a claim of persecution on account of a particular social group in the Immigration Judge's decision. The petitioners acknowledge this when they admit in their brief that neither the "immigration judge

nor the BIA gave any legal analysis as to" whether the petitioners "belong[ed] to a particular social group. . . . " Pet. Br. 8. Nor did the Immigration Judge make any finding as to whether petitioners were persecuted on account of their alleged political opinion. In fact, the Immigration Judge's decision itself establishes he made no such findings. Under section 208 of the INA, an Immigration Judge is first required to establish whether an alien has been persecuted, and then whether that finding comes under one of the five categories under section 208 of the INA in order to determine eligibility for asylum.

Since the Immigration Judge did not make a final ruling on whether the conduct petitioners' experienced or fear was on account of membership in a particular social group, or a political opinion, this Court must remand this case to the Board in order to allow it to decide these issue [sic] in the first instance. *INS v. Ventura*, 123 S. Ct. 353 (2002) (requiring remand on issues not decided by the agency below). When a court reviews an adjudicatory decision by a federal agency that Congress has charged with administering a statute, a respect for the agency's primary jurisdiction requires the court to refrain from rendering its own findings of fact or resolving issues the agency did not consider. *Id.* In fact, "[g]enerally speaking, a court of appeals should remand a case to an agency for decision of a matter that statutes place primarily in agency hands. This principle has obvious importance in the immigration context." *Ventura*, 123 S. Ct. at 355. *See also Port of Portland v. United States*, 408 U.S. 811, 842 (1972) ("[o]ur appellate function in administrative cases is limited to considering whether the announced grounds for the agency decision comport with applicable legal principles"); *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943) ("an

appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency."). A court of appeals "is not generally empowered to conduct a de novo inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry." *Ventura*, 123 S. Ct. at 355, *quoting Florida Power & Light Co. v. Lorian*, 470 U.S. 729, 744 (1985). Rather, if the agency has not decided certain aspects of the case, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation. *Florida Power & Light Co.*, 470 U.S. at 744.

In light of these firmly established principles, the Supreme Court held in *Ventura* "that well-established principles of administrative law did require the Court of Appeals to remand the 'changed circumstances' question to the [Board]." *Ventura*, 123 S. Ct. at 355.

Just as remand was warranted in *Ventura* because the Board had not reached the "changed circumstances" question, remand is required if the Court finds substantial evidence does not support the Immigration Judge's persecution finding here, since the Immigration Judge did not decide whether any alleged persecution in this case came under one of the five categories under section 208 of the INA. As previously discussed, the Immigration Judge denied petitioners' asylum and withholding applications on the basis that petitioners were not persecuted in the past and did not show a well-founded fear of future persecution in Russia. Consequently, under *Ventura* and other binding precedent, this Court may not reach the issue of whether said persecution was "on account of" petitioners being a member of a particular social group, or any of the other grounds provided in the INA, because these issues have not been finally addressed and decided by the agency

below. *See also INS v. Chen*, 326 F.3d 1316 (9th Cir. 2003) (once court has reversed decision of the Board it is appropriate to remand so BIA can decide asylum issues rather than for Court to decide issues); *Singh v. INS*, 292 F.3d 1017, 1025 (9th Cir. 2002) (reversing Board's adverse credibility determination and remanding, but declining to consider merits of asylum claim where "the Board had not yet had an opportunity to address the remaining issues.").

II. PETITIONERS FAILED TO MEET THEIR BURDEN OF ESTABLISHING WITHHOLDING OF REMOVAL.

As already set forth above in the discussion of the controlling law section, in order to be eligible for withholding of removal under section 241(b) (3) of the INA, an alien must demonstrate a "clear probability of persecution," showing by objective evidence that persecution is "more likely than not." As argued above, petitioners failed to satisfy the lower burden of proof required for asylum. Therefore, they necessarily failed to satisfy the clear probability standard of eligibility required for withholding of removal. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 423 (1987); *De Valle v. INS.*, 901 F.2d at 790 (where petitioner failed to meet threshold burden of establishing statutory eligibility for asylum, he could not meet the tougher standard required for withholding of deportation). Thus, the Immigration Judge was correct in denying petitioners' application for withholding of removal. A.R. 2-3.

CONCLUSION

For the reasons stated above, the petition for review should be denied and the decision of the Immigration Judge should be affirmed.

Respectfully submitted,

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Dated: November 24th, 2003 Attorneys for Respondent

STATEMENT OF RELATED CASES

In accordance with Local Circuit Court Rule 28.1 (a)(ii), counsel for respondent declares that based on a survey of the attorneys in this office, he is not aware of any related cases pending in this Circuit.

/s/ [Illegible]
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Dated: November 24th, 2003

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a) AND NINTH CIRCUIT RULE 32.

I certify that pursuant to Fed. R. App. P. 32(a)(4), (5), (6), and (7), and Ninth Circuit Rule 32, the attached Brief For Respondent is monospaced spaced [sic], has a typeface of 12 points (Courier New), contains 879 lines and 7,490 total words, and contains fewer than 22 pages.

/s/ [Illegible]
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Dated: November 24th, 2003

CERTIFICATE OF SERVICE

I certify that on the 24th day of November, 2003, two copies of the **BRIEF FOR RESPONDENT** were placed in a mail room at the United States Department of Justice for service by same-day mailing, first-class postage pre-paid, upon petitioner's counsel at the following address:

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